Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

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U.S. Customs Service

Treasury Decisions

19 CFR Part 4

(T.D. 91-17)

CUSTOMS REGULATIONS AMENDMENT EXTENDING RECIPROCAL PRIVILEGES TO VESSELS OF PAKISTAN

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations by adding Pakistan to the list of nations whose vessels may transport empty cargo vans, empty lift vans, and empty shipping tanks between points embraced within the coastwise laws of the United States. The Department of State has supplied Customs with evidence that Pakistan places no restrictions on the carriage of empty cargo vans, empty lift vans, and empty shipping tanks by vessels of the United States between ports in Pakistan. This amendment recognizes the United States granting reciprocal privileges for vesels registered in Pakistan.

DATE: This amendment is effective February 26, 1991. The reciprocal privileges for vessels registered in Pakistan became effective on September 18, 1990.

FOR FURTHER INFORMATION CONTACT: Kristina Ver Steeg, Carrier Rulings Branch (202-566-5706).

SUPPLEMENTARY INFORMATION:

Background

Section 27, Merchant Marine Act of 1920, as amended (46 U.S.C. App. 883), (the "Act"), provides generally that no merchandise shall be transported by water, or by land and water, between points in the United States except in vessels built in and documented under the laws of the United States and owned by U.S. citizens. However, the 6th proviso of the Act, as amended, states that, upon a finding by the Secretary of the Treasury (pursuant to information obtained and furnished by the Secretary of State) that a foreign nation does not restrict the transportation of certain articles between its ports by vessels of the United States, re-

ciprocal privileges will be accorded to vessels of that nation, and the prohibition against the transportation of those articles between points in the United States will not apply to its vessels.

Section 4.93(b) (1), Customs Regulations (19 CFR 4.93(b) (1)), lists those nations found to extend reciprocal privileges to vessels of the United States for the transportation of empty cargo vans, empty lift vans, and empty shipping tanks.

On September 18, 1990, the Department of State advised the Chief, Carrier Rulings Branch, Customs Service Headquarters, that Pakistan places no restrictions on the transportation of empty cargo vans, empty lift vans, and empty shipping tanks by vessels of the United States between ports in that country.

The authority to amend this section of the Customs Regulations has been delegated to the Chief, Regulations and Disclosure Law Branch.

Finding

On the basis of the information received from the Department of State, it has been found that Pakistan places no restrictions on the transportation of empty cargo vans, empty lift vans, and empty shipping tanks by vessels of the United States between ports in that country. Therefore, appropriate reciprocal privileges are accorded to vessels registered in Pakistan as of September 18, 1990.

Inapplicability of Public Notice and Delayed Effective Date Requirements, The Regulatory Flexibility Act and Executive Order 12291

Because this amendment merely implements a statutory requirement and confers a benefit upon the public, pursuant to 5 U.S.C. 553(b) (B), notice and public procedure thereon are unnecessary; further, for the same reasons, good cause exists for dispensing with a delayed effective date under 5 U.S.C. 553(d) (1) and (3). Since this document is not subject to the notice and public procedure requirements of 5 U.S.C. 553, it is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This amendment does not meet the criteria for a "major rule" as defined in E.O. 12291, and accordingly, a regulatory impact analysis is not required.

Drafting Information

The principal author of this document was Peter T. Lynch, Regulations and Disclosure Law Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

List of Subjects in 19 CFR Part 4

Cargo vessels, Coastwise trade, Maritime carriers, Vessels.

Amendment to The Regulations

To reflect the reciprocal privileges granted to vessels registered in Pakistan, Part 4, Customs Regulations (19 CFR Part 4), is amended as set forth below:

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

1. The authority for Part 4 continues to read in part as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1624; 46 U.S.C. App. 3;

* * * * * * *

§ 4.93 also issued under 19 U.S.C. 1322(a), 46 U.S.C. App. 883;

* * * * * * *

§ 4.93 (Amended)

2. Section 4.93(b) (1) is amended by adding "Pakistan" in appropriate alphabetical order to the list of nations entitled to reciprocal privileges.

Dated: February 21, 1991.

KATHRYN C. PETERSON,
Chief,
Regulations and Disclosure Law Branch.

[Published in the Federal Register, February 26, 1991 (56 FR 7804)]

(T.D. 91-18)

REVOCATION OF INDIVIDUAL BROKER LICENSE NO. 4549, ALLEN J. ROBBINS; AND CORPORATE BROKER LICENSE NO. 5390, ROBBINS, INC.

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: Notice is hereby given that the Secretary of the Treasury, pursuant to Section 641, Tariff Act of 1930, as amended (19 U.S.C. 1641), and Part 111.74 of the Customs Regulations, as amended (19 CFR 111.74), revoked the individual broker license no. 4549 issued to Allen J. Robbins, and the corporate broker license no. 5390 issued to Robhins, Inc. This action having been upheld by the United States Court of International Trade (Court No. 85-10-01442) is effective as of April 27, 1990.

Dated: February 26, 1991.

WILLIAM J. LUEBKERT,
Deputy Director,
Office of Trade Operations.

[Published in the Federal Register, March 5, 1991 (56 FR 9247)]

(T.D. 91-19)

REVOCATION OF INDIVIDUAL BROKER LICENSE NO. 5522; STUART ROBBINS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: Notice is hereby given that the Secretary of the Treasury, pursuant to Section 641, Tariff Act of 1930, as amended (19 U.S.C. 1641), and Part 111.74 of the Customs Regulations, as amended (19 CFR 111.74), revoked the individual broker license no. 5522 issued to Stuart Robbins. This action having been upheld by the United States Court of International Trade (Court No. 85-9-01319); and, under appeal, by the Court of Appeals for the Federal Circuit (Appeal No. 90-1403) is effective as of January 9, 1991.

Dated: February 26, 1991.

WILLIAM J. LUEBKERT,
Deputy Director,
Office of Trade Operations.

[Published in the Federal Register, March 5, 1991 (56 FR 9247)]

U.S. Court of Appeals for the Federal Circuit

Moss Manufacturing Co., Inc., plaintiff-apppellant *v.* United States, defendant-appellee

Appeal No. 89-1544

(Decided February 13, 1990)

Peter S. Herrick, of Miami, Florida, argued for plaintiff-appellant. With him on the brief was *Fred P. Bingham, III.*

Joseph I. Liebman, Attorney in Charge, International Trade Field Office, of New York, New York, argued for defendant-appellee. With him on the brief were *Stuart E. Schiffer*, Acting Assistant Attorney General, *David M. Cohen*, Director and *Kenneth N. Wolf.*

Appealed from: U.S. Court of International Trade. *Judge* Carman.

Before Bissell,* Archer and Mayer, *Circuit Judges.*

Mayer, *Circuit Judge.*

Opinion

Moss Manufacturing Company, Inc. (Moss) appeals the judgment of the United States Court of International Trade affirming the United States Customs Service's (Customs) appraisal for duty purposes of a single entry of ceiling fans. *Moss Manufacturing Co., Inc. v. United States*, 714 F. Supp. 1223 (Ct. Int'l Trade 1989). We affirm.

Background

Moss is an American company engaged in the buying and importation from the Far East of merchandise for resale in the United States. To facilitate transactions between itself and the foreign sellers and manufacturers with whom it deals, in 1981 Moss established D.M.Z. Offshore Services, Ltd. (DMZ) as an independent entity to function as its agent in the Far East. DMZ's responsibilities in this capacity include sourcing merchandise, negotiating prices and freight rates, and entertaining Moss' customers who visit the Far East. In exchange for these services, the agency agreement between them obligates Moss both to reimburse DMZ for any fees and costs incurred in facilitating a transaction and to pay DMZ a "buying commission".

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*Judge Bissell, who died on February 4, 1990, did not participate in the consideration or decision of this case.

The method of calculation and manner of payment of DMZ's commissions varied from transaction to transaction and year to year. Moss' primary objective in negotiating the commissions was to insure that, in any given year, their sum be sufficient to fund the operation of DMZ's offices in Hong Kong. As a consequence, Moss did not report the buying commissions to Customs in a consistent manner. In particular, at least until October of 1983, Moss paid DMZ commissions only on selected transactions; those commissions Moss did pay, even thereafter, were included variously as part of the "price paid", reported separately, or omitted altogether on Customs entry documents. This inconsistent treatment triggered, in 1985, a thorough Customs review of several hundred Moss entries over the preceding few years. The entry at issue here, which occurred in September of 1983, is one of those chosen for review. The parties have selected it as a "test case" pursuant to the rules of the Court of International Trade; that court has stayed three other actions between the same parties pending decision in this case.

This transaction involved the purchase by Moss of several sets and types of ceiling fans. By an undated "pro forma" invoice from Moss to C.E.C. Electrical Manufacturing Co., Ltd. (CEC), Moss ordered 1165 ceiling fans with a total price of $39,808.00. The invoice included an additional sum of $1,747.50, denoted as "Brokerage, Inspection Service Fee required to be remitted to DMZ Hong Kong Services, Ltd.". Thus, the total amount of the pro forma invoice was $41,555.50.

To pay for the merchandise, Moss applied for and received from Standard Chartered Bank of Miami, Florida (Standard Bank), a letter of credit for the same amount. However, the letter of credit recited only the aggregate amount of $41,555.50 and an "invoice value" of $39,808.00, together with the instruction that the beneficiary (CEC) remit $1.50 per fan to a second bank in Hong Kong to the account of DMZ. The effect of this condition would be the same as if Moss were to pay $1,747.50 directly to DMZ, but the alleged "commission" was not separately identified in the letter of credit and the letter gives no indication of what the $1.50 per fan payment was for. Moss' president and chief executive officer testified that DMZ was paid in this way because Standard Bank demanded it: the bank wanted all payments related to the transaction included in a single letter of credit.

CEC accepted, filled, and shipped Moss' order for 1165 fan sets. However, there were several significant discrepancies between the accompanying commercial invoice, dated September 26, 1983, and the pro forma invoice prepared by Moss. Most importantly, the total prices differed—$40,510.50 versus $39,808.00—and the commercial invoice did not identify any portion of the total amount or any separate amount as a "buying commission", "brokerage fee", or the like. Second, the unit price for each of the three types of fans ordered was higher on the commercial invoice. Finally, CEC erroneously shipped 480 five-bladed fans of a certain style instead of the 480 four-bladed fans of that style ordered by Moss.

Nevertheless, Moss accepted the shipment and under the letter of credit Standard Bank paid CEC the total commercial invoice price plus the $1.50 per fan "commission". The record contains a "Negotiating Bank Certificate" indicating that DMZ was in turn paid the $1.50 per fan amount required by the letter of credit, but the certificate is silent about the source of the funds. The total amount paid by Standard Bank, $42,258.00, exceeded the amount stated in the letter of credit by $702.50.

Based on the entry documentation, which included both the pro forma and commercial invoices as well as a copy of the Moss/DMZ agency agreement, Customs appraised the value of the entry for duty purposes at the full $42,258.00. Moss protested that the appraisal was incorrect because it included the $1.50 per fan "buying commission" indirectly remitted to DMZ. Such a commission, Moss argued, does not constitute part of the price paid "for the merchandise" and is therefore not includable in the "transaction value" upon which Customs bases its duty appraisals.

The Court of International Trade disagreed. It held that where the seller is responsible for disbursing a portion of the total payment to a buying agent who "assisted in bringing about the sale", that portion is money expended for the benefit of the seller, is properly includable as part of the price paid for the goods, and hence is part of the transaction value. 714 F. Supp. at 1229. The court concluded that Moss had not overcome the presumption of correctness, 28 U.S.C. § 2639(a)(1) (1982), that attached to Customs' appraisement. 714 F. Supp. at 1229. Moss appeals.

Discussion

Moss erroneously assumes the premise of its argument, a factual finding that the Court of International Trade was careful *not* to make: that the $1.50 per fan payment to DMZ was a bona fide buying commission. The court's deliberate characterization of the $1,747.50 as a "payment" or "disbursement" rather than "commission" is not mere semantics; it underscores the principle that not even all *direct* payments from a buyer to a bona fide buying agent are bona fide buying commissions. A buyer like Moss "has the burden of proving the existence of a bona fide buying agency *and* that the charges paid were, in fact, bona fide buying commissions" before those commissions can be considered for exclusion from dutiable value. *Rosenthal-Netter, Inc. v. United States*, 679 F. Supp. 21, 23 (Ct. Int'l Trade) (emphasis added), *aff'd*, 861 F.2d 261 (Fed. Cir. 1988).**

**Dicta in *Rosenthal-Netter* suggests, and the Court of International Trade here apparently agreed, *see* 714 F. supp. at 1228, that bona fide buying commissions are per se non-dutiable under the post-1979 "transaction value" scheme of appraisement (as they were under the prior "export value" scheme). We need not reach this issue. Moss has failed to establish that the $1,747.50 payment here is a bona fide buying commission. Moreover, since the term "buying commission" does not appear in the current statutory scheme, pigeonholing certain payments as such is of no avail to buyers like Moss. Monies paid to agents like DMZ are non-dutiable only if they do not otherwise fit within the definitions of statutorily relevant terms like "price paid or payable", upon which "transaction value" for appraisal purposes is based. *See infra.*

Moss succeeded in proving the former but not the latter. The court agreed that "Moss conclusively established that DMZ was its bona fide buying agent", 714 F. Supp. at 1229, but it did not similarly resolve the conflicting evidence on the nature of the $1,747.50 payment in Moss' favor. In particular, the court found that the discrepancies described above between the pro forma and commercial invoices "were never adequately explained". *Id.* at 1227 n.2. Moss itself conceded that the higher price shown on the commercial invoice was only "mainly" explainable on the basis of CEC's erroneous shipment of five instead of four-bladed fans. Moss' president admitted that an increase in the price of brass also might have contributed to the higher commercial invoice price. In light of the additional facts that DMZ apparently never prepared any invoices of its own, as required by the Moss/DMZ agency agreement, separately listing its buying commission and other charges; and that the bank certificate acknowledging receipt by DMZ of $1,747.50 does not specify from whom the payment came or for what it was intended, the trial court's conclusion that Moss had not carried its burden of proving that the disputed amount was a bona fide buying commission is amply supported by the evidence.

In any event the Court of International Trade recognized that whether a payment properly may be characterized as a "buying commission" as such is no longer relevant for the purposes of determining its liability to duty. Appraisal for duty purposes is now based on "transaction value", defined as the "price actually paid or payable for the merchandise when sold for exportation to the United States. * * *" 19 U.S.C. § 1401a(b)(1) (1982). The statute in turn defines "price actually paid or payable":

> The term "price actually paid or payable" means the total payment (whether direct or indirect, and exclusive of any costs, charges, or expenses incurred for transportation, insurance, and related services incident to the international shipment of the merchandise from the country of exportation to the United States) made, or to be made, *for imported merchandise by the buyer to, or for the benefit of, the seller.*

Id. § 1401a(b)(4)(A) (emphasis added). Moss devotes virtually all of its argument to an explanation of how a bona fide buying commission cannot constitute a payment "for the merchandise" within the meaning of this statute. But as noted above, this misses the point for two reasons: it assumes the disputed payment was in fact a bona fide buying commission and it treats this nonexistent finding as critical. The Court of International Trade clearly said that the payment was "for goods", 714 F. Supp. at 1227; on this record, we see no reason to question that statement. Therefore, whether a bona fide buying commission constitutes a payment "for merchandise" within the meaning of the statute is a question we need not decide.

The second requirement for a payment to come within the definition of "price paid or payable" is that it be to *or* for the benefit of the seller.

Neither party disputes that the payment involved here was made "to" the seller and the Court of International Trade assumed this fact. *Id.* When combined with the court's conclusion that the payment was "for goods", this fact is sufficient to render the payment dutiable under 19 U.S.C. § 1401a(b)(4).

Nevertheless, the court proceeded with an analysis of the benefit which the payment conferred on the seller and concluded that "where the payment for goods was made to the seller with instructions to disburse part of such funds to the buyer's agent, and where the agent assisted in bringing about the sale, the disbursement constituted monies expended for the benefit of the seller within the meaning of 19 U.S.C. § 1401a(b)." *Id.* at 1229. We agree with this conclusion and also with the court's observation that concomitant benefit to the buyer does not detract from the benefit realized by the seller. *Id.* at 1228. Apart from DMZ's undisclosed role in facilitating this particular sale, CEC also benefited, even if slightly, from its temporary possession of the payment ultimately remitted to DMZ. The small "float" CEC enjoyed on this payment is no less significant to us than the additional duty owed on the payment itself is to Moss.

Finally, the payment here does not fall within either that group of items that specifically can be added to the price paid or payable pursuant to 19 U.S.C. § 1401a(b)(1) or those items specifically excludable from transaction value under section 1401a(b)(3). The statutory scheme for determining transaction value is relatively simple: subject to specifically enumerated additions and exclusions, an appraisal for duty purposes is based on the price paid for the merchandise to or for the benefit of the seller. This straightforward approach is no doubt intended to enhance the efficiency of Customs' appraisal procedure; it would be frustrated were we to parse the statutory language in the manner, and require Customs to engage in the formidable fact-finding task, envisioned by Moss.

Conclusion

The judgment of the Court of International Trade is affirmed.

AFFIRMED

AVESTA AB AND AVESTA STAINLESS, INC., PLAINTIFFS-APPELLANT *v.* UNITED STATES, DEFENDANT-APPELLEE, ALLEGHENY LUDLUM STEEL CORP., ARMCO INC., JESSOP STEEL CORP., J & L SPECIALTY PRODUCTS CO., WASHINGTON STEEL CORP., AND UNITED STEELWORKERS OF AMERICA, AFL/CIO-CLC, DEFENDANTS

Appeal No. 90-1120

(Decided September 14, 1990)

Patrick C. Reed, Freeman, Wasserman & Schneider, of New York, New York, argued for plaintiffs-appellants. With him on the brief was *Jack Gumpert Wasserman*.

Stephen McLauahlin, Office of the General Counsel, U.S. International Trade Commission, of Washington, D.C., argued for defendant-appellee. With him on the brief were *Lyn M. Schlitt*, General Counsel and *James A. Toupin*, Assistant General Counsel. *Jeffrey Beckington*, Collier, Shannon & Scott, of Washington, D.C., argued for defendants. With him on the brief was *Paul C. Rosenthal*.

Appealed from: U.S. Court of International Trade.
Judge CARMAN.

Before MARKEY, *Circuit Judge** BENNETT, *Senior Circuit Judge*, and CONTI, *Senior District Judge.***

CONTI, *Senior District Judge*.

DECISION

Avesta AB and Avesta Stainless, Inc. (collectively Avesta) appeal from a decision of the Court of International Trade affirming the determination of the United States International Trade Commission (ITC) not to institute a review under section 751(b) of the Tariff Act of 1930, (19 U.S.C. § 1675(b)), of an outstanding antidumping order for imported stainless steel plate from Sweden. We affirm.

BACKGROUND

In 1973, the United States Tariff Commission issued a finding that over the previous several years Swedish stainless steel plate was being dumped in the domestic market at less than fair value, and that these imports were causing material injury to a domestic industry. An antidumping order was issued and remains in effect today.[1] In 1985, Avesta AB, the sole Swedish producer and exporter of stainless steel plate, along with its domestic affiliate, Avesta Stainless, Inc., sought under section 751(b) of the Tariff Act of 1930, 19 U.S.C. § 1675(b), to have the 1973 antidumping order revoked or modified in light of changed circumstances. Section 751(b) provides that the ITC shall conduct a full investigation of whether to revoke an antidumping order whenever the ITC receives a request which it determines as a threshold matter "shows changed circumstances sufficient to warrant a review." 19 U.S.C. § 1675(b)(1). The ITC dismissed Avesta's 1985 review request after finding that none of the circumstances cited by Avesta constituted a sufficient change in circumstances to warrant investigation. This decision was upheld by the Court of International Trade. *Avesta v. United States*, 689 F. Supp. 1173 (Ct. Int'l Trade 1988) (*Avesta I*).

In 1987, after amending its list of alleged changed circumstances, Avesta again petitioned for a section 751(b) investigation of the 1973 an-

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* Circuit Judge Markey vacated the position of Chief judge on 27 June 1990.

** The Honorable Samuel Conti, Senior District Judge, United States District Court for the Northern District of California, sitting by designation.

1 The antidumping order was published in the Federal Register, 38 Fed.Reg. 15,079 (1973).

tidumping order.[2] The ITC, by a three-to-two margin, once more determined that Avesta did not show sufficient changes in circumstances to warrant further review. As before, the Court of International Trade affirmed the ITC's decision. *Avesta AB v. United States*, 724 F. Supp. 974 (Ct. Int'l Trade 1989) (*Avesta II*). It is from that affirmance that Avesta appeals.

ISSUE

Was the Court of International Trade correct in holding that the determination by the ITC not to commence an investigation to review the 1973 antidumping order was not arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.

OPINION

The standard of review is undisputed. The ITC's determination not to institute a review investigation under section 751(b) must stand unless "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(A). Nonetheless, Avesta raises an issue of first impression in arguing that the ITC made a clear error of law by failing to apply the appropriate legal standard as to what qualifies as "changes in circumstances *sufficient to warrant review*" under section 751(b). 19 U.S.C. § 1675(b)(1) (emphasis added). Essentially, Avesta's contention is that the critical statutory language—"sufficient to warrant review"—is not self-executing in terms of the level of persuasion required at this initial inquiry stage and does not guide or in any meaningful way constrain the ITC's exercise of discretion. In fact, Avesta asserts that in this case, given the indeterminate meaning and application of these critical terms in section 751(b), the ITC's decision does not manifest that any guiding legal standard was applied in reaching the conclusion that appellant did not show changed circumstances sufficient to warrant review.

Rather than leaving it to the ITC to interpret according to the ultimately indeterminate terms of section 751(b) what level of persuasion is

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[2] The eight alleged changes in circumstances raised in plaintiffs' 1987 petition for review before the ITC were:

1. The number of stainless steel producers in Sweden declined from four in 1972 to a single producer in 1987 and Sweden's capacity to produce stainless steel has declined as a result;
2. Imports of hot-rolled stainless steel plate have been and remain at *de minimis* levels;
3. The *de minimis* levels of imports from Sweden result from the 1976 acquisition of a U.S. hot-rolled plate producing mill by Avesta;
4. Swedish steel exports to the European Community (EC) rose sharply after it was allowed duty-free entry in the EC in 1972.
5. In contrast to the early 1970s, Voluntary Restraint Agreements (VRAs) setting export quotas were signed by a number of competitor countries, except Sweden, thereby adding a measure of protection for U.S. producers of stainless steel;
6. The fact that Sweden has not entered into a VRA places Avesta at a competitive disadvantage because its exports remain subject to antidumping and countervailing duties while those from VRA countries do not;
7. That Avesta produces a continuously made cold-rolled plate in widths which U.S. firms are unable to produce; and,
8. Avesta's current exports to the U.S. include two types of stainless steel plate that are patented, which did not exist in the 1970s, and which U.S. firms cannot supply.

The petition to the ITC asked that the order at least be modified to exclude the allegedly uniquely Swedish products described in paragraphs 7 and 8 above. The court notes that the first four items above were raised in Avesta's 1985 petition and, as such, had previously been rejected by both the ITC and the Court of International Trade.

necessary to trigger a review investigation, plaintiffs suggest that "*a reasonable appearance*" of changes in circumstances should be the rule of decision regarding the sufficiency of alleged changes to warrant a review. Petitioner cites in support of this standard the fact that at issue here is a threshold inquiry. Congress's imposition of the ultimate burden of persuasion in the investigation under section 751(b) on petitioner would be mere surplusage, Avesta contends, if a petitioner is held to the same standard of proof at the initial inquiry stage. *Cf. Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927 (Fed. Cir. 1984) (granting a review request does not constitute proof that revocation is mandated but merely sets the review process in motion). Finally, Avesta argues that an unfairly high burden forces decisions to be made on incomplete factual records and frustrates statutory intent that antidumping duties be remedial rather than punitive—that they be imposed only where material injury to domestic industry will persist.[3]

The court agrees with appellant insofar as it asserts that the critical language in section 751(b) contains less than exacting standards of decision. The real issue, though, is whether congressional intent compels this court to impose further standards on the ITC's determinations or, as appellees argue, whether Congress delegated the decision as to what constitutes a change in circumstances sufficient to warrant a review investigation to the discretion of the ITC to be determined on a case-by-case basis. After canvassing the legislative history and discernable congressional intent, we agree with the latter position.

The genesis of section 751(b) reveals that even prior to the enactment of the statute in 1979, it was the practice of the ITC to entertain requests for reviews of existing injury determinations on an *ad hoc* basis.[4] In 1974, the Senate Committee on Finance explicitly approved such practices and even rejected efforts to codify the reconsideration process along the lines of section 751(b). The Committee stated:

> [P]roposals to include statutory language regarding certain concepts and terms, such as * * * reconsideration of agency determinations and findings * * * were not accepted for the reason that the Committee believes that the matters involved are adequately treated under, existing practices and *are best left to individual case determinations without additional statutory guidelines*.

S. Rep. No. 1298, 93d Cong., 2d Sess. 178-179, 181 (1974) (emphasis added). In 1977, the ITC promulgated a regulation which formally adopted this practice:

> (c) *Institution of investigation*. The ITC may institute an investigation * * * upon receipt of an application * * * from an interested per-

[3] *See* Agreement on Interpretation of Article VI of the General Agreement on Tariffs and Trade, Apr. 12, 1979, art. 9, para. 1, 31 U.S.T. 4919, T.I.A.S. No. 9650.

[4] The regulatory origins and prior history of section 751(b), as codified in 19 U.S.C. § 1675(b)(1), are more fully recounted in *Avesta I. Avesta AB v. United States*, 689 F. Supp. 1173, 1178-1179.

> son specifying the changed circumstances forming the basis for review. * * *

19 C.F.R. § 207.5(c) (1978). Congress was fully aware of this regulation and practice when, in 1979, it repealed the Antidumping Act of 1921, 19 U.S.C. § 160 (1921) and replaced it with the Trade Agreements Act of 1979, Pub. L. No. 96-39, § 107, 93 Stat. 144, 193, (1979), which incorporated section 751(b). S. Rep. No. 249, 96th Cong., 1st Sess. 79-81 (1979); H.R. Rep. No. 317, 96th Cong., 1st Sess. 71-72 (1979). In light of this history, Congress's knowing choice of the "sufficient to warrant review" language in section 751(b) manifests its intent that the review process continue to proceed on a case-by-case basis.

In 1984, Congress discussed and enacted amendments to section 751 in the Tariff and Trade Act of 1984, Pub. L. No. 98-573, 98 Stat. 2948 (1984). The court finds it persuasive that the detailed amendments to section 751 left untouched the *ad hoc* nature of ITC decisions to institute review. *See Kelly v. United States*, 826 F.2d 1049, 1052 (Fed. Cir. 1987)(Congress adopts administrative interpretation of statute when it reenacts statute unchanged). Certainly there was ample evidence of the ITC's practice under section 751(b).[5] If Congress had felt it necessary to curtail its broad delegation of discretion to the ITC in these matters, it could have supplemented the statutory language of section 751(b) with the "reasonable indication" standard it employed for preliminary determinations of injury, 19 U.S.C 1673b(a), or it could have injected some other standard such as the "reasonable appearance" standard proposed by Avesta. Significantly, Congress chose not to do so.

Finally, Congress's adoption of a limited standard of judicial review of the ITC's determinations under section 751(b) further manifests its intent to broadly commit such decision to the discretion of the agency. In choosing such a narrow standard of review Congress specifically deferred to the agency's expertise and "entrusted the decision-making authority in a specialized, complex economic situation to administrative agencies." S. Rep. No. 249, 96th Cong., 1st Sess. 252 (1979). Indeed, the Supreme Court has instructed that because the arbitrary and capricious standard applies in areas of special agency expertise, substantial deference must be afforded the agency's determinations so long as they possess a rational basis in fact. *Consolo v. Federal Maritime ITC*, 383 U.S. 607, 620-21 (1966); *Zenith Radio Corp. v. U.S.*, 437 U.S. 443, 450-01 (1978); *See also American Lamb Co. v. United States*, 785 F.2d 994, 1001 (Fed. Cir. 1986).

The court finds that Congress's approval of the *ad hoc* administration of section 751(b) emerges from the examination of the evolution, language, applicable standard of review and subsequent history of this provision. The ITC's finding that Avesta had not established changed circumstances sufficient to warrant review was, in fact, an "exercise of

---

[5] The *ad hoc* approach to initiating review investigations was manifest in a series of ITC decisions between 1980 and 1984. *See e.g.*, Birch Three-Ply Door Skins From Japan, Inv. No. 751-TA-6, USITC Pub. 1271 (July, 1982); Salmon Gill Fish Netting Of Manmade Fibers From Japan, Inv. No. 751-TA-5, USITC Pub. 1234 (March, 1982).

discretion * * * predicated upon judgment anchored in the language and spirit of the relevant statutes and regulations." *Freeport Minerals Co. v. United States*, 776 F.2d 1029, 1032 (Fed. Cir. 1985). As such, its conclusion was in no sense an error of law. What remains, then, is appellant's contention that the ITC's decision was arbitrary and capricious and an abuse of discretion.

The ITC determined, after evaluating the record, that Avesta's alleged changed circumstances, many of which had recently been rejected by the ITC and the Court of International Trade in *Avesta I*, were either the direct and anticipated result of the imposition of import relief, were unsupported by the record, or had no significant connection to the impact of dumped Swedish stainless steel plate on domestic industry. For instance, the fact that imports declined and are presently *de minimis* was found to be an expected result of the antidumping order. The acquisition of a domestic mill did not, the ITC majority concluded, sufficiently alter Avesta's import practices. Avesta's monopolization of the Swedish industry, while decreasing its absolute productive capacity, still left sufficient unused productive capacity according to the ITC to enable Avesta to dump plate here and still satisfy its domestic and other foreign markets. The allegation of increases in exports to the European Community evaporated under scrutiny by the ITC. In addition, the existence of VRA's, which placed no restrictions on the quantity of Swedish imports while subjecting signatory nations to quotas, was determined not to affect the impact of such exports on the domestic industry. Finally, the ITC concluded after conducting a like-product analysis that the allegedly uniquely Swedish types of plate were neither factually nor legally entitled to "exclusion." The court concludes after independently assessing the record and arguments before it that the ITC's determination that Avesta had not demonstrated changes sufficient to warrant review was not arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. Further elaboration, in light of the trial court's thorough and well reasoned examination of this issue, *Avesta AB v. United States*, 724 F. Supp. 974, would only add needless redundancy and therefore the court adopts the examination and reasoning of that opinion as its own.

Conclusion

For the reasons stated above, the Court of International Trade's decision in this case is

AFFIRMED.

BAKELITE THERMOSETS, LTD., PLAINTIFF-APPELLANT *v.*
UNITED STATES, DEFENDANT-APPELLEE

Appeal No. 90-1499

(Decided February 21, 1991)

James S. O'Kelly, Barnes, Richardson & Colburn, of New York, New York, argued for plaintiff-appellant. With him on the brief was *Sandra Liss Friedman*.

Saul Davis, Trial Attorney, Commercial Litigation Branch, Department of Justice, of New York, New York, argued for defendant-appellee. With him on the brief were *Stuart M. Gerson*, Assistant Attorney General, *David M. Cohen*, Director and *Joseph I. Liebman*, Attorney in Charge, Internation Trade Field Office. Also on the brief was *Edward N. Maurer*, U.S. Customs Service, of counsel.

Appealed from: U.S. Court of International Trade.
Judge RESTANI.

Before MAYER, *Circuit Judge*, SKELTON, *Senior Circuit Judge*, and CLEVENGER, *Circuit Judge*.

CLEVENGER, *Circuit Judge*.

Bakelite Thermosets, Ltd. (Bakelite) appeals, pursuant to 28 U.S.C. § 1295(a)(5) (1988), from a judgment of the United States Court of International Trade sustaining a Customs Service determination that its imported asphalt emulsion is not classifiable as "Asphaltum, bitumen, and limestone-rock asphalt" under item 521.11 of the Tariff Schedules of the United States (TSUS). *Bakelite Thermosets. Ltd. v. United States*, 744 F. Supp. 1164 (Ct. Int'l Trade 1990).

The Customs Service classified Bakelite's imported asphalt emulsion under item 523.91, TSUS, "Mineral substances, and articles of mineral substances, not specially provided for: Other: Not decorated."

Bakelite does not challenge the factual finding below that the inclusion of 8% wax in the imported asphalt emulsion results in a product in which both asphalt and wax perform important permanent functions in end use. Based on this finding, the Court of International Trade properly held that Bakelite failed to overcome the presumption of correctness accorded the Customs Service classification, and we affirm on the basis of its opinion, which we adopt.

AFFIRMED

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave

Senior Judges

Morgan Ford

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 91–7)

EASTALCO ALUMINUM CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court Nos. 83-01-00092, 83-01-00093, 83-01-00094, 83-01-00096, and 83-01-0098

Suspension Calendar 83-01-00095

F.W. MYERS & CO., INC., A/C EASTALCO ALUMINUM CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 84-04-00588

Suspension Calendar 83-01-00095

INTALCO ALUMINUM CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court Nos. 83-05-00696, 83-05-00697, 83-05-00698, 83-05-00699, 83-06-00792, 85-11-01644, 85-11-01645, and 88-10-00814

Suspension Calendar 83-01-00095

[Previous determination affirmed.]

(Decided February 11, 1991)

Neville, Peterson & Williams (*John M. Peterson* and *Peter J. Allen*), for plaintiff.

Stuart M. Gerson, Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, (*Bruce N. Stratvert*), Civil Division, United States Department of Justice, for defendant.

Joseph S. Kaplan and *Andrew P. Vance* (*Richard Kaplan*, *Alan Kamnitz* and *Michelle F. Forte*, of counsel), for *amicus curiae* Customs and International Trade Bar Association.

OPINION

RESTANI, *Judge*: These matters are before the Court of International Trade (CIT) on plaintiffs' Rule 59(a) motion for rehearing and reconsideration of the court's decision herein of October 26, 1990, *Eastalco Aluminum Company, et al. v. United States*, 14 CIT___, 750 F. Supp. 1135 (1990) (*Eastalco II*). The instant actions challenge United States Customs Service (Customs) denials of determinations as to tariff classification. The actions were suspended, prior to the filing of any pleadings, pending the determination of a test case. *See* CIT Rule 84. The test case resulted in the granting of the government's counterclaim for classification under a provision requiring greater duties than the provision under

which Customs liquidated the merchandise at issue. *See Eastalco Aluminum Co. v. United States*, 13 CIT___, 726 F. Supp. 1342 (1989), *aff'd*, Appeal No. 90-1130 (October 18, 1990) (*Eastalco I*).

In *Eastalco II*, the court essentially prohibited plaintiffs from noticing dismissal of the suspended actions, despite language in CIT Rule 41(a) indicating they could notice dismissal prior to filing of an answer. The court ruled that CIT Rule 41(a) must be read in the context of the court's other rules with regard to suspension and counterclaims, in order to decipher its meaning. In its previous opinion, the court found that the rules of procedure were unclear and that both parties should have raised the issue of the effect of the counterclaim on the suspended actions at the outset. The court then weighed the equities and determined that the duties owed should be paid.

The parties and *amicus curiae*, Court of International Trade Bar Association, raise the same legal arguments that were addressed previously. Plaintiffs raise at least one new argument and further equitable arguments. While these arguments might have been raised initially, in the interests of justice the court allowed further oral argument and has reviewed its decision.

In addition to its previous arguments plaintiffs noted at oral argument that stays of proceedings, which may be analogous to suspensions, have been held not to prevent Rule 41(a)(1) dismissals. The cases on this point appear to involve a statutory right to stay proceedings and compel arbitration under the United States Arbitration Act, 9 U.S.C. §§ 1-14 (1988). *See, e.g., Hamilton v. Shearson-Lehman American Express Inc.*, 813 F.2d 1532 (9th Cir. 1987); *Merit Ins. Co. v. Leatherby Ins. Co.*, 581 F.2d 137 (7th Cir. 1978). This matter is not without controversy. *See Merit, supra*, at 144-45 (Swygert, J., dissenting). Nonetheless, a statutory stay for arbitration purposes is not a close analogy to the suspensions at issue here. For example, the *Merit* majority notes defendant's right to answer. *See id.* at 143. Presumably the court believed defendant, the party who moved for a stay, might have answered before filing its motion. This court has indicated previously that almost all of the cases here were suspended before defendant had formulated its counterclaim, and there were no complaints which could be answered. Furthermore, the court is not prepared to say that every time a court orders a stay of proceedings, the cases applicable to stays for arbitration will apply.

Courts stay suits for many reasons. The Federal Rules of Civil Procedure and the rules of this court do not describe when a general stay may be granted or what effect it shall have. That is a matter left to the decision-maker in each case, based on what it views as necessary for appropriate administration of its cases. Thus, just as a judge may set the length of a stay, presumably that judge may define what may or may not take place under a stay.

Generally if a case is stayed, no activity may take place by either party without obtaining court permission. The court sees no reason why, in

certain circumstances, a stay could not *expressly* forbid dismissals, as well as discovery or pleadings. What a stay *implicitly* permits or forbids would appear to depend on the purpose of the stay.

Here the form of stay is a suspension which is largely defined by the rules of this court. The rules are silent, however, as to whether dismissals upon notice may take place under facts such as the ones involved here. CIT Rule 84(f) does state that an order suspending an action shall stay all further proceedings and "filing of papers." It would appear that under a literal reading of CIT Rule 84, notices of dismissal would not be permitted in any case while it is on the suspension calendar. Once the test case is completed, however, the cases suspended thereunder move to the suspension disposition calendar. *See* CIT Rule 85. While the rules governing the suspension disposition calendar do not address removal from that calendar by dismissal, notice of dismissal is an accepted practice under that rule, if counterclaims are not involved. Like CIT Rule 84, CIT Rule 85 is silent as to the effect of test case counterclaims on Rule 41(a) dismissals. In any case, whatever the implications of the language of CIT Rules 84 and 85, thus far the court has ruled only that the suspension system does not permit Rule 41(a) dismissals under the particular facts before the court, that is, identical merchandise, years of litigation, and numerous opportunities to terminate the litigation, or substantial parts of it, earlier. *See Eastalco II*. It makes no ruling as to Rule 41(a) dismissals in other circumstances. Plaintiffs and *amicus curiae* also raise equitable arguments which are slightly more developed than in initial briefing.

Plaintiffs' view is that, whether CIT Rule 41(a) supports plaintiffs' position or is unclear, remedies were available to defendant. In plaintiffs' view the prejudice to defendant is its own fault, whereas plaintiffs are penalized, not by their own inaction, but by the court's misinterpretation of the rules or by a lack of a common understanding of the rules. Plaintiffs believe that, in order to avoid CIT Rule 41(a) dismissals, defendant could have sought removal from suspension and could have forced the filing of pleadings, either for the purpose of resuspension or for consolidation for trial.

The court has already addressed the point that resuspension is not a favored outcome under the rules. *See id.* at___, 750 F. Supp. at 1143. Thus, under plaintiffs' view, after compelling pleadings the court apparently could be left with massive consolidations. As indicated by the court, such consolidations would defeat the purpose of the suspension system and also would deprive plaintiffs of the "no res judicata" rule applicable to classification cases. *See id.* at___, 750 F. Supp. at 1137. Therefore, the court remains unconvinced that defendant had readily available and recognized remedies under the rules, which it should have employed.

Plaintiffs and *amicus curiae*, however, continue to argue that the equities were improperly weighed because, despite the court's view of the rules, the bar as a whole understood the rules as plaintiffs did. They

argue that plaintiffs are prejudiced by what is, in effect, a failure to apply the rules as understood by practitioners. The court is keenly aware that rules, whether good or bad, should not be changed without notice. Furthermore, if the rules of court are generally understood by the bar to operate in a certain manner, this would be of relevance to the court's balancing of the equities, as well as to proper interpretation of the rules. Accordingly, this point was of great concern to the court and the court pressed *amicus curiae*, the prime proponent of this view, for evidence of the bar's understanding.

No affidavits were submitted indicating that the particular issue before the court had been discussed at bar conferences or meetings prior to the court's decision. No practice manuals or treatises were cited on this point. In addition, neither plaintiffs nor *amicus curiae* could point to any prior case in which the United States permitted dismissal of cases suspended under a test case in which defendant was successful on its counterclaim and in which a monetary recovery to the United States would have resulted if the test cases were resolved similarly. On the other hand, a representative of the United States stated that plaintiffs' view was not the universally accepted view and cited to earlier cases in which judgments were stipulated in suspended cases, without pleadings, on the basis of a successful test case counterclaim. *See Minolta Corp. v. United States* Court Nos. 83-08-01144, *et al.* Stipulated Judgment on Agreed Statement of Facts (May 7, 1990). Plaintiff disputes whether such dismissals would have been economically disadvantageous to plaintiff in the particular circumstance. In any case, the outcome of this discussion appears to be that there is no clear evidence of a practice at odds with the court's interpretation of the rules.

Accordingly, the court finds that the equities are not different from the court's original understanding. Until the rules of court are amended, parties are on notice to agree early on to a method for disposition of the cases, suspended or to be suspended under a test case involving a counterclaim. Failing agreement of the parties, the court should be apprised so that it can expressly state the effect of the suspension in order to delineate options before they are lost. The court remains of the view that Rules 41(a), 13, 84, and 85 do not permit notices of dismissal under the facts presented here.

(Slip Op. 91-8)

CENTRAL SOYA CO., INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 88-07-00575

ON DEFENDANT'S MOTION TO STRIKE AFFIDAVIT

In this action pertaining to "substitution same condition drawback," pursuant to 19 U.S.C. § 1313(j)(2), defendant moves to strike the affidavit of George C. Steuart, submit-

ted by plaintiff in support of plaintiff's motion for summary judqment. In his affidavit, Mr. Steuart, a former employee of the Customs Service, stated that he drafted Customs Service regulations for substitution same condition drawback, and explained the intended meaning of the regulations.

Held: Since the affidavit presents legislative facts of which the court may take judicial notice, defendant's motion to strike the affidavit is denied.

[Defendant's motion denied.]

(Dated February 13, 1991)

Soller, Shayne & Horn, (*Carl R. Soller* and *Margaret H. Sachter*, Of Counsel), for plaintiff.

Stuart M. Gerson, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch (*Al J. Daniel, Jr.* on the motion), for defendant.

RE, *Chief Judge*: The question presented in this case pertains to the plaintiff-importer's entitlement to a drawback, or refund, pursuant to 19 U.S.C. § 1313(j)(2), on customs duties paid on imported merchandise when, within three years of the importation, substitute fungible goods are exported in the same condition as the imported goods. The drawback, or refund, authorized pursuant to this statute and the customs regulations promulgated thereunder, is referred to in customs law as a "substitution same condition drawback." Both parties have moved for summary judgment.

The case is now before the court on the defendant's motion to strike the affidavit of George C. Steuart, which was submitted by the plaintiff in support of its motion for summary judgment. In his affidavit, Mr. Steuart, a former employee of the Customs Service, stated that he was responsible for drafting the Customs Service regulations for substitution same condition drawback, and explained the intended meaning of the regulations.

The question presented on this motion is whether, under Rule 56(f) of the Rules of this court, an affidavit by a former Customs Service employee, stating that he was responsible for drafting certain regulations on substitution same condition drawback and stating the intended meaning of the regulations, is admissible into evidence and may be submitted on a motion for summary judgment pertaining to Customs' enforcement of those regulations.

Since Mr. Steuart's affidavit presents legislative facts of which the court may take judicial notice, the affidavit is admissible and the defendant's motion to strike is denied.

BACKGROUND

The plaintiff, Central Soya Company, Inc., imported certain crude degummed soybean oil. The plaintiff thereafter entered into a contract to sell an amount of similar crude oil to the Bunge Corporation. Since the imported crude oil had already undergone processing, the plaintiff performed its contract with Bunge by delivering to Bunge domestic crude oil. Pursuant to a contract between Bunge and a foreign corporation, the domestic crude oil was exported by Bunge. The plaintiff then sought a drawback or refund of duties paid on the imported crude oil.

The plaintiff's request was denied by Customs on the ground that Bunge, and not the plaintiff, was the exporter of the substituted crude oil. *See* 21 Cust. Bull. 365, C.S.D. 87-6 (1987).

The plaintiff then brought this action, contending that the Customs Service exceeded its statutory authority, and illegally denied the plaintiff substitution same condition drawback. The defendant contends that Customs did not exceed its authority, since 19 U.S.C. § 1313(j)(2), read in the light of its legislative history, requires that the person claiming drawback must also be the exporter of the substituted merchandise. Plaintiff moved for summary judgment, and defendant cross-moved for summary judgment.

Section 1313(j)(2) of title 19 was enacted as section 202 of the Trade and Tariff Act of 1984, Pub. L. No. 98-573, 98 Stat. 2948, 2973 (1984). Section 1313(j)(2) provides that:

> (2) If there is, with respect to imported merchandise on which was paid any duty, tax, or fee imposed under Federal law because of its importation, any other merchandise (whether imported or domestic) that—
>
> (A) is fungible with such imported merchandise;
> (B) is, before the close of the three-year period beginning on the date of importation of the imported merchandise, either exported or destroyed under Customs supervision;
> (C) before such exportation or destruction —
>
> (i) is not used within the United States, and
> (ii) is in the possession of the party claiming drawback under this paragraph; and
>
> (D) is in the same condition at the time of exportation or destruction as was the imported merchandise at the time of its importation;
>
> then upon the exportation or destruction of such other merchandise the amount of each such duty, tax, and fee paid regarding the imported merchandise shall be refunded as drawback, but in no case may the total drawback on the imported merchandise, whether available under this paragraph or any other provision of law or any combination thereof, exceed 99 percent of that duty, tax, or fee.

19 U.S.C. § 1313(j)(2) (1988).

Pursuant to 19 U.S.C. § 1313(1), the Customs Service promulgated regulations for substitution same condition drawback. Customs Regulation 191.141(h) provides that:

> If legal person X possesses imported merchandise (the designated merchandise) during some time interval in period A (defined below) and also possesses other merchandise fungible with it (the substituted merchandise) during the same or different time interval in period A, then 99 percent of the duty paid on the designated merchandise will be refunded as drawback, provided that:
>
> (1) The designated merchandise was in the same condition as imported either at the time of substitution, the time X used it in manu-

facturing, or at the time X transferred it to another person, whichever occurs first;

(2) The substituted merchandise is in the same condition when exported or destroyed under Customs supervision as was the designated merchandise when imported;

(3) X does not issue a certificate of delivery covering the designated merchandise nor a certificate of manufacture and delivery covering articles manufactured or produced therefrom; and

(4) X maintains records to establish requirements, (1), (2), and (3) of this section and also complies with all relevant reguirements of § 191.141 (a) through (g) of this chapter.

19 C.F.R. § 191.141(h) (1990).

Hence, the question presented, on the plaintiff's motion for summary judgment, and the defendant's cross-motion for summary judgment, is whether the Customs Service exceeded its statutory authority in denying the plaintiff substitution same condition drawback, pursuant to 19 U.S.C. § 1313(j)(2), on the ground that the plaintiff was not the exporter of the substituted merchandise.

In support of its motion for summary judgment, the plaintiff submitted the affidavit of George C. Steuart, a former employee of the Customs Service. In his affidavit, Mr. Steuart stated that, from November, 1975 to April 3, 1986, he served as the "Chief of the Drawback and Bonds Branch at Customs Headquarters," and that, in that capacity, he "was responsible for drafting the section of the Customs Service regulations applicable to substitution same condition drawback, 19 U.S.C. 1313(j)(2), and the publication of these regulations in final form on July 23, 1985, as 19 C.F.R. 191.141(h)."

Mr. Steuart, in his affidavit, also stated that during 1983 and 1984, Congress considered amending the drawback statute, 19 U.S.C. § 1313, to permit a substitution same condition drawback. He indicated that several proposed bills required that the person claiming the drawback had to be both the importer of the original merchandise, as well as the exporter of the substituted merchandise.

Mr. Steuart stated that he knew that the proposed bills requiring that the claimant be both the importer and the exporter "had been rejected both by the House Ways and Means Committee and the Congress in favor of the provision that a claimant be required to have possessed the exported merchandise." He also added that with the lesser requirement that the claimant only have "possessed" the exported merchandise, "Customs was concerned that the substitution same condition drawback would be abused by linking shipments of merchandise that had no commercial relationship to one another." Hence, he explained that he "drafted the regulations for substitution same condition drawback to ensure that both lots of merchandise would come into the possession of the same entity at some time between the importation of the designated merchandise and the export of the substituted merchandise."

Commenting specifically on Customs Regulation 191.141(h), Mr. Steuart stated that:

> The term "legal person X," was chosen for this new entity as a broad neutral term, applicable either to an individual or a corporation, and not identifiable *per se* with any other party to the drawback transaction.* * * This entity was to exchange or substitute the merchandise for the imported merchandise just as did the manufacturer that substituted domestic merchandise, an exchange recognized under older drawback law.* * * "Legal person X" was not intended to refer to the drawback claimant, and the regulations were not intended to add the requirement that a claimant of substitution same condition drawback possess both lots of merchandise.

DISCUSSION

Rule 56(f) of the Rules of this court provides that a party moving for summary judgment may submit affidavits in support of the motion. Rule 56(f) states that the affidavits "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." The question before the court, therefore, is whether Mr. Steuart could have testified as to the facts contained in his affidavit.

The plaintiff contends that "Rule 56(f) is inapplicable because the statements in Mr. Steuart's affidavit are not adjudicative facts, to which such an evidentiary requirement would apply, but legislative facts presented to inform the Court about the history of certain Customs Regulations." The plaintiff adds that the evidence presented by Mr. Steuart's affidavit is "analogous to facts about the legislative history of a statute to which the rules of evidence do not apply, and of which the Court may take judicial notice in its deliberations on questions of law."

Federal Rule of Evidence 201 provides for judicial notice in the federal courts. Rule 201 states, in pertinent part:

> (a) Scope of rule.—This rule governs only judicial notice of adjudicative facts.
>
> (b) Kinds of facts.—A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

As stated by subsection (a) of Rule 201, Rule 201 pertains only to "judicial notice of adjudicative facts." It is important to note that "[n]o rule deals with judicial notice of 'legislative' facts." Fed. R. Evid. 201 advisory committee's note.

Legislative facts, in contrast to adjudicative facts, "are those [facts] which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body." *Id.* (citing Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 Harv.

L. Rev. 364, 404-07 (1942)). It may be stated generally, that adjudicative facts pertain to the parties to the dispute, whereas all other facts are "legislative facts." *See* 3 K. Davis, *Administrative Law Treatise* § 15.5 (2d ed. 1980). Furthermore, the court has broad power or discretion to take judicial notice of legislative facts. *See* 1 D. Louisell & C. Mueller, *Federal Evidence* § 56 (1977).

The facts contained in Mr. Steuart's affidavit are clearly "legislative facts." They do not pertain to the parties to the dispute. Instead, the facts contained in Mr. Steuart's affidavit are intended to assist the court in what may be termed "legal reasoning and the lawmaking process." *See* Fed. R. Evid. 201 advisory committee's note. Consequently, since the court may take judicial notice of the legislative facts contained in Mr. Steuart's affidavit, the affidavit is admissible, and may be submitted on plaintiff's motion for summary judgment.

It may be well to add that, to state that the court may admit or accept an affidavit which contains statements of intent, however, is no indication of the credit or probative value of those statements. This distinction between admissibility and probative value is basic in the law of evidence, and is illustrated by the concept of "relevancy," as contained in the Federal Rules of Evidence.

Federal Rule of Evidence 402 provides that all relevant evidence is admissible, provided that it is not deemed inadmissible by the Constitution or by statute. The language used in Rule 402 was chosen to make clear the distinction between the admissibility of evidence and its sufficiency. *See* Fed. R. Evid. 401 advisory committee's note.

This fundamental distinction between admissibility and probative value was stressed by Professor Wigmore. *See* 1A J. Wigmore, *Evidence* § 28 (rev. ed. 1983). In considering whether evidence is admissible, "[t]he project is to determine whether a particular fact is fit to be considered, not whether it suffices for a demonstration." *Id.*

In considering the persuasiveness or probative value of affidavits which contain statements of administrative intent, such as those in Mr. Steuart's affidavit, the court may proceed by analogy to the various canons designed to assist in the interpretation and application of statutes. *See United States v. Heller*, 726 F.2d 756, 762 (Temp. Emer. Ct. App. 1983). *See also General Elec. Co. v. United States*, 610 F.2d 730, 734 (Ct. Cl. 1979). In addition, it is basic in the interpretation of statutes that, when the statutory language is ambiguous and there is clear indication of legislative intent, a statute should be interpreted to effectuate that intent. *See Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Indeed, it may be noted that the Supreme Court has considered the testimony of draftspersons of statutes as probative evidence in the interpretation of those statutes. *See, e.g., Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories*, 460 U.S. 150, 160 (1983). *See generally*, Comment, *The Value of Nonlegislators' Contributions to Legislative History*, 79 Geo. L.J. 359, 385-88 (1990) (list of Su-

preme Court cases in which the Court considered the statutory interpretation offered by nonlegislators).

Consequently, if the regulations on substitution same condition drawback are not in violation of statute, the intention of the Customs Service in carrying out the legislative intent in its regulations is relevant to an interpretation of validly promulgated regulations.

Although the case law of this court has not articulated the distinction between admissibility and probative value, it does nevertheless indicate that the testimony of the drafter of a statute or regulation is not necessarily of probative value.

In *Kuehne & Nagel, Inc. v. United States*, 10 CIT 814 (1986), the plaintiff protested the classification of certain entries of tobacco as stemmed filler tobacco, under item 170.35 of the Tariff Schedules of the United States (TSUS). The plaintiff contended that the tobacco was properly classifiable as scrap tobacco, under item 170.60, TSUS, or, alternatively, as tobacco not specifically provided for, under item 170.80, TSUS. *See id.* at 814.

The court noted that the classification of the imported tobacco was governed by the meaning of the terms used in the TSUS at the time of the enactment of the TSUS. *See id.* at 815. Thus, in support of its interpretation of the terms used in the TSUS, the plaintiff cited the Tariff Classification Study of 1960, a report of the United States Tariff Commission. *See id.* at 816-17. Plaintiff also presented "the testimony of the very person who drafted the *Tariff Classification Study*[,] * * * subject to the court's ruling on a motion to strike. * * *" *Id.* at 817. This court, however, found the testimony "only minimally probative." *Id.* at 818. In a footnote, the court added:

> [T]he court believes that much of this witness' testimony should not be admitted into evidence. The court should not be in the position of calling upon legislators and their staff to explain meaning. Courts interpret statutes by looking at the statute, and the information that was available to all members of Congress when Congress considered the legislation at issue. The secret knowledge or thoughts of drafters are irrelevant.

Id., n. 9. *See also National Customs Brokers and Forwarders Ass'n of Am. v. United States*, 14 CIT___, 731 F. Supp. 1076, 1080-81 (1990).

That an affidavit of the author of a statute, stating the author's intention in drafting the statute, may not be probative of the suggested interpretation has also been noted by other courts. *See Friedman v. United States*, 364 F. Supp. 484, 488 (S.D. Ga. 1973); *Epstein v. Resor*, 296 F. Supp. 214, 216 (N.D. Cal. 1969), *aff'd*, 421 F.2d 930 (9th Cir.), *cert. denied*, 398 U.S. 965 (1970).

Conclusion

Since Mr. Steuart's affidavit presents legislative facts of which the court may take judicial notice, the affidavit is admissible. Accordingly, the defendant's motion to strike the affidavit is denied.

(Slip Op. 91–9)

FORMER EMPLOYEES OF SOUTHERN TRIANGLE OIL CO., PLAINTIFF *v.* U.S. SECRETARY OF LABOR, DEFENDANT

Court No. 89-03-00158

MEMORANDUM OPINION AND ORDER

(Dated February 14, 1991)

Charles Pierson, pro se.

Stuart M. Gerson, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U. S. Department of Justice (*Vanessa P. Sciarra*) for the defendant.

MUSGRAVE, *Judge*: Thls action was initiated by Mr. Charles Pierson, a former employee of the Southern Triangle Oil Company, to contest the refusal by the Department of Labor ("Labor") to permit him to participate in the worker adjustment assistance benefits program being administered for other former employees of the company. In an opinion of February 14, 1990, 14 CIT___, 731 F. Supp. 517, this Court determined that the refusal to allow Mr. Pierson to participate was wrongful and in violation of the adjustment assistance legislation, especially in the light of amendments to that legislation recently enacted by Congress. Those amendments expressly extended the coverage of the adjustment assistance legislation to certain categories of workers to whom the applicability of the legislation had previously been in doubt. In its February 14 opinion the Court identified three requirements in the amendment that must be met in order for a worker to qualify thereunder: first, the certification of the particular assistance program under which the worker seeks to participate must have been made in response to a petition that was filed before November 23, 1988; second, the certification must be one that would not have been made but for subparagraph (A) of the amendment (making clear that the assistance legislation applies to persons formerly employed by firms engaged in the exploration or drilling for, or the production otherwise of, oil or natural gas); and third, the worker seeking to participate in the program must have been most recently separated, wholly or in part, from employment at the particular firm on or after September 30, 1985. 14 ClT at___, 731 F. Supp. at 520. Data contained in the administrative record showed that the first and third criteria were met, and the Court so recognized; the only issue remaining for decision was whether the second requirement was met, that is, whether the assistance program under which Mr. Pierson sought to participate would not have been certified had Congress not enacted subparagraph (A) of the 1988 amendment. The Court concluded that the third requirement was met and stated,

> The amendment, then, clearly extends to workers like Mr. Pierson who lose their jobs drilling for oil as a result of increases in oil imports.

14 CIT at ___, 731 F. Supp. at 521. In response to arguments by the Government that the requirement was not met, the Court further stated,

> Based on the unambiguous language of subparagraph (A), its accompanying legislative history, and [previous court decisions], it is clear that Mr. Pierson and Southern Triangle are precisely the kind of worker and company to which Congress intended the amendment to apply.

Id. Thus, in the light of its conclusion that Congress added subparagraph (A) to make clear that the adjustment assistance legislation was applicable to persons such as Mr. Pierson who had previously been excluded from participation in the assistance programs, the Court held that the third requirement was met and that Labor's refusal to allow Mr. Pierson to participate in the program in question was unlawful.

Having heard an appeal of that decision, the Court of Appeals for the Federal Circuit in its opinion of January 22, 1991 held that the factual record was insufficient to support this Court's judgment.[1] In that opinion, the Court of Appeals stated,

> In this case, the record does not reveal that a finding has been made, by the Department of Labor or by the Court of International Trade, that Mr. Pierson or other workers separated from Southern Triangle [during the period in question] would not have been certified as eligible for assistance but for the 1988 amendments.[2]

The Court of Appeals vacated the opinion of this Court and ordered that the case be remanded to Labor to find the legally operative facts as identified in the Court of Appeals' opinion.

Accordingly, the Court hereby remands this action to the Department of Labor in accordance with the Court of Appeals' opinion, with instructions that Labor make a finding identified in the opinion of the court of Appeals. Labor shall report its finding to this Court within twenty (20) days from the date on which this Order is issued.

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[1] *Former Employees of Southern Triangle Oil Co. v. United States*, Slip Op. 90-1351 (unpublished).
[2] *Id.* at p.2.

(Slip Op. 91–10)

IWATSU ELECTRIC CO., LTD., AND IWATSU AMERICA, INC.; TOSHIBA CORP. AND TOSHIBA AMERICA INFORMATION SYSTEMS, INC.; MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., MATSUSHITA COMMUNICATIONS INDUSTRIAL CO., LTD., KYUSHU MATSUSHITA ELECTRIC CO., LTD., AND MATSUSHITA ELECTRIC CORP. OF AMERICA; GOLDSTAR TELECOMMUNICATION CO., LTD.; SAMSUNG ELECTRONICS CO., LTD.; ORIENTAL PRECISION CO., LTD.; INTER-TEL INC.; EXECUTONE INFORMATION SYSTEMS, INC., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND AMERICAN TELEPHONE AND TELEGRAPH CO., DEFENDANT-INTERVENOR

Consolidated Court No. 90-01-00016

[ITC determination sustained.]

(Dated February 15, 1991)

Skadden, Arps, Slate, Meagher & Flom (*Thomas R. Graham*, *William E. Perry* and *John J. Burke*) for Iwatsu Electric Co., Ltd. and Iwatsu America, Inc.

Mudge, Rose, Guthrie & Ferdon (*N. David Palmeter* and *Jeffrey S. Neeley*) for Toshiba Corporation and Toshiba America Information Systems, Inc.

Weil, Gotshal & Manges (*A. Paul Victor*, *Jeffrey B. Bialos* and *Martin S. Applebaum*) for Matsushita Electric Industrial Co., Ltd., Matsushita Communication Industrial Co., Ltd., Kyushu Matsushita Electric Co., Ltd. and Matsushita Electric Corporation of America.

Dow, Lohnes & Albertson (*William Silverman*, *Michael P. House* and *Barry A. Pfeifer*) for Goldstar Telecommunication Co., Ltd., Samsung Electronics Co., Ltd. and Oriental Precision Co., Ltd.

Crowell & Moring (*C. Michael Hathaway*, *Jean-Pierre Swennen* and *Eduardo Maldonado*) for Inter-Tel, Inc.

Hunton & Williams (*William F. Young*, *Lynda M. Rozell* and *Eric J. Murdock*) for Executone Information Systems, Inc.

Lyn M. Schlitt, General Counsel, *Judith M. Czako*, Acting Assistant General Counsel, United States International Trade Commission (*Stephen A. McLaughlin*) for defendant.

Covington & Burling (*Harvey M. Applebaum*, *O. Thomas Johnson, Jr.*, *Sonya D. Winner* and *Susan L. Burke*) for defendant-intervenor.

OPINION

RESTANI, Judge: Plaintiffs, producers and importers of small business telephone systems from Japan and Korea, challenge the final affirmative determinations of the United States International Trade Commission ("ITC") in *Certain Telephone Systems and Subassemblies Thereof from Japan and Taiwan*, Inv. Nos. 731-TA-426 and 428 (Final) (November 1989) ("Japanese Final Determination"), USITC Pub. No. 2237; 54 Fed. Reg. 50,446 (December 6, 1989) and *Certain Telephone Systems and Subassemblies Thereof from Korea*, Inv. No. 731-TA-427 (Final) (January 1990) ("Korean Final Determination"), USITC Pub. No. 2254; 55 Fed. Reg. 4,248 (February 7, 1990)[1] that imports into the United States of small business telephone systems ("SBTSs") and sub-

[1] The investigations of imports from these three countries were instituted simultaneously, but ITC extended the final investigation regarding Korean imports and issued a separate determination for Japanese and Taiwanese imports. ITC, however, decided to cumulate imports from all three countries and the Korean Final Determination specifically incorporates by reference the reasoning and findings contained in ITC's final determination on imports from Japan and Taiwan. The "final determinations" referred to in this opinion will be both the Japanese Final Determination and the Korean Final Determination.

assemblies from Japan, Taiwan and Korea, which were found to be sold at less than fair value ("LTFV"), have caused material injury to the domestic industry that produces a like product.[2] Plaintiffs argue that the final determinations, which were based on the affirmative votes of three of six commissioners,[3] are not supported by substantial evidence. Accordingly, plaintiffs seek reversal of the final determinations.

For the following reasons, the court finds the final determinations of ITC are supported by substantial evidence in the record and are otherwise in accordance with law. Plaintiffs' motion for judgment on the agency record is therefore denied and this action is dismissed.

Background

I. *The SBTS Market:*

On December 28, 1988, American Telephone and Telegraph Company ("AT&T") together with Comdial Corporation filed an antidumping petition pursuant to Section 735 of the Tariff Act of 1930, as amended, charging that AT&T, the principal domestic producer of SBTSs, and other domestic producers were injured by imports of LTFV SBTSs and subassemblies thereof from Japan, Taiwan and Korea. The imported articles under investigation here consist of both subassemblies, a component product, and the SBTS, a finished telephone system. ITC limited its dumping inquiry to SBTSs capable of internal or intercom calling and having a total non-blocking[4] port[5] capacity of between 2 and 256 ports. Subassemblies were defined to consist of (1) control and switching equipment, (2) power supplies, (3) other circuit cards and modules, and (3) telephone sets and consoles. Each of these parts is dedicated for use in an installed system produced by the same manufacturer. In the SBTS market as a whole, the various subassemblies differ greatly from one another. There is also wide variance within the product lines of each individual producer.

SBTSs ultimately are sold either directly to an end user or to an interconnect[6] or distributor who, in turn, sells the equipment to the end user. AT&T sells most of its equipment directly to the end user using its own internal distribution system. Final Staff Report ("Final Staff Rep.") at A-121. The foreign producers, in contrast, generally market their product at the wholesale level, selling to interconnects and distributors. *Id.* at A-122. Thus, as ITC found, "competition at the end user level is primarily between AT&T and interconnects." Japanese Final Determination ("Japanese Final Det.") at 39.

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[2] The Department of Commerce made separate findings that sales were at LTFV. That decision is not immediately before the court. *See infra*, discussion at 6-7.

[3] Affirmative votes of three of six commissioners are sufficient to support a final affirmative determination. *See* 19 U.S.C. § 1677(11) (1988).

[4] When a system has reached the total number of connections possible and a call is attempted, the requesting telephone receives a dial tone. This is referred to as call blocking. A system's maximum non-blocking capacity is defined in terms of the capacity at which a communication path will always exist for each attached station.

[5] A port is a point of access in a system and may be either internal or external. The majority of SBTSs have less than 40 ports.

[6] An interconnect is a dealer at the wholesale level of distribution who sells his product through sales representatives. Final Staff Report at A-122 n. 130.

II. *Administrative History:*

On February 8, 1989, ITC unanimously determined, after conducting its preliminary investigation, that there was a reasonable indication that the domestic SBTS industry was being materially injured by reason of imports of certain telephone systems and subassemblies from Japan, Taiwan and Korea. *See Certain Telephone Systems and Subassemblies Thereof From Japan, Korea, and Taiwan*, Inv. Nos. 731-TA-428 (Preliminary) USITC Pub. No. 2156 (Feb. 1980). In making its preliminary determination, ITC defined the domestic "like product" (that comparable to the class of imports under investigation) as all systems and subassemblies dedicated for use in an SBTS and defined the domestic industry as the producers of such systems and subassemblies. After examining the financial performance data submitted by AT&T, which represented virtually the entire domestic industry, and specifically noting certain declines in profits, production and shipments, ITC found a reasonable indication of material injury. *Id.* at 31. In addition, ITC decided to cumulate the volume and effect of imports from Japan, Korea and Taiwan for the purposes of examining the causal connection between the material injury to the domestic industry and the imports. *Id.* at 32-35.

In rendering its preliminary affirmative determination on causation, ITC relied on its finding that "the volume of imports and the increase of market share of imports relative to domestic like product are significant and probative of a reasonable indication of a casual connection between the allegedly LTFV imports and the material injury being experienced by the domestic industry." *Id.* at 36. Regarding price, ITC noted that the available data "shed somewhat limited light on the effects of imports on prices * * *" *Id.* at 37. ITC observed that direct price comparisons between the subject imports and domestic like product were difficult because price data for the domestic product were provided for SBTSs on the installed systems level, whereas imported prices were at the basic equipment level. ITC did find, however, that "the data show a general decrease in prices of both domestic and imported systems over the period under investigation * * *" *Id.* at 39.

Following ITC's preliminary determination, the Department of Commerce ("Commerce") commenced its investigations of whether the imports from the subject countries were sold at LTFV. On October 11, 1989, Commerce rendered final ITC determinations that there were LTFV sales imports from Japan and Taiwan. *See Final Determination of Sales at Less Than Fair Value: Certain Small Business Telephone Systems and Subassemblies Thereof From Japan*, 54 Fed. Reg. 42,541 (Oct. 17, 1989); *Final Determination of Sales at Less Than Fair Value: Certain Small Business Telephone Systems and Subassemblies Thereof From Taiwan*, 54 Fed. Reg. 42,543 (Oct. 17, 1989). After extending the proceeding concerning imports from Korea, Commerce concluded that imports from Korea were likewise being sold at LTFV. *See Final Determination of Sales at Less Than Fair Value: Certain Small Business Tele-*

phone Systems and Subassemblies Thereof From Korea, 54 Fed. Reg. 53,141 (Dec. 27, 1989).

On August 2, 1989, ITC commenced its final injury investigation. As noted earlier, ITC ultimately concluded that the domestic industry producing equipment dedicated for use in SBTSs was materially injured by reason of LTFV imports from Japan, Taiwan and Korea. Plaintiffs challenge the final ITC determinations. Specifically, plaintiffs contend that the financial data submitted by AT&T to ITC for use in the investigation was manipulated by AT&T and, as such, should not have been relied upon by ITC. Plaintiffs also object to ITC's final determinations on the grounds that the price data cited by ITC in its causation analysis was flawed, that other supportive data in the record was not the basis of the determinations, and, in any case, such data is insufficient to support an affirmative determination.

Discussion

I. *Legal Background:*

The standard to be applied by this court in reviewing a final ITC determination is whether it is in accordance with law and is supported by substantial evidence on the record. 19 U.S.C. § 1516a(b)(1)(B) (1988). "Substantial evidence" has been defined as follows:

> Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion * * * [It] is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.

Matsushita Elec. Indus. Co. v. United States, 750 F.2d 927, 933 (Fed. Cir. 1984) (quoting *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 619-20 (1966) and *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951)). As the trier of fact, ITC must assess the quality of the evidence and give such weight to the evidence as it believes is justified. The court's inquiry is limited to legal issues and an assessment of whether substantial evidence supports the determination.

United States antidumping law delegates to ITC the responsibility for making a final determination of whether:

> (A) an industry in the United States-
>
> (i) is materially injured, or
>
> (ii) is threatened with material injury, or
>
> (B) the establishment of an industry in the United States is materially retarded,
>
> by reason of imports * * * of the merchandise with respect to which the administering authority [has rendered a final affirmative determination that sales were at LTFV] * * *

19 U.S.C. § 1673d(b)(1) (1988). Thus, antidumping relief is granted if ITC finds, first, that the domestic industry has been materially injured

or threatened with material injury and, second, that the injury is attributable, at least in part, to imports in the class found by Commerce to have been sold at LTFV.

In examining this causal connection between imports and the material injury, Congress has directed ITC to determine whether a class of imports sold at LTFV is causing injury. This court has held that the statutory language does not dictate that the injury be traced back to the particular sales found to be at LTFV, nor does it require that ITC demonstrate that dumped imports, through the effects of particular margins of dumping, are causing injury. Rather, ITC must examine the effects of imports of a *class* or *kind* of merchandise which is found to be sold at LTFV and make its conclusion about causation accordingly. *See e.g.. Algoma Steel Corp., Ltd. v. United States*, 12 CIT ___, ___, 688 F. Supp. 639, 645 (1988), *aff'd*, 865 F.2d 240 (Fed. Cir.), *cert. denied*, 109 S. Ct. 3244 (1389). The commissioners voting in the affirmative appear to accept this standard. The court need not examine the views of the dissenters in detail, although it appears that one of the dissenters did not utilize this standard.

II. *Material Iniury Caused by LTFV Imports:*

The court will examine injury and causation separately. That is the framework used in the final affirmative determinations, and such a framework has been accepted previously by the court. References to ITC or to its determination are to the affirmative determinations contained in the Japanese Final Determination and not to views of dissenting commissioners.

A. *Evidence in the Record Regarding Existence of Material Injury:*

The first prong of the inquiry undertaken by ITC involves an assessment of the condition of the domestic industry. Under this prong, the domestic industry must be experiencing a material injury. "Material injury" is defined as "harm which is not inconsequential, immaterial, or unimportant." 19 U.S.C. § 1677(7)(A) (1988).

In this case, after expressly examining domestic consumption, domestic production, capacity, capacity utilization, shipments, inventories, employment and financial performance pursuant to 19 U.S.C. § 1677(7)(C)(iii), ITC noted that "[t]he financial condition of the domestic industry can only be characterized as very poor throughout the period of investigation." Japanese Final Det. at 23. ITC also stated that

> Consideration of all the indicators relating to the condition of the domestic industry leads us to conclude that the industry is experiencing material injury. Shipments are declining, inventories have built up. There have been significant adverse trends in employment. Most importantly, financial data show inadequate operating margins and an insufficient cash flow to fund necessary investment in the maintenance, modernization, and expansion of domestic production facilities and the development of the next generation of products.

Id. at 25. In other words, ITC based its conclusion on four findings: (1) overall domestic shipments of SBTSs and subassemblies declined; (2) inventories increased; (3) employment levels, hours worked, and total compensation declined; and (4) poor operating margins existed and therefore the cash flow necessary for maintenance and growth was absent.

Although these findings alone provide sufficient support for ITC's affirmative injury determination, it should be emphasized that ITC need not find all economic indicators to be negative to make a finding of material injury. The legislative history of the 1979 amendments to the antidumping statute states that ITC has the authority to weigh each factor in light of the circumstances:

> *The significance of the various factors affecting an industry will depend upon the facts of each particular case.* Neither the presence nor the absence of any factor listed in the bill can necessarily give decisive guidance with respect to whether an industry is materially injured, and *the significance to be assigned to a particular factor is for the ITC to decide.*

S. Rep. No. 249, 96th Cong., 1st Sess. 88, *reprinted in*, 1979 U.S. Code Cong. & Admin. News 381, 474 (emphasis added). *See also Copperweld Corp. v. United States*, 12 CIT ___, ___, 682 F. Supp. 552, 562 (1988) (where the court quotes the legislative history and observes that ITC may assign a varying degree of significance to a factor depending upon the facts of a particular case).

Plaintiffs, however, contend that the record evidence of the financial performance of the domestic industry is flawed and nonprobative of whether material injury exists.[7] Because, in the context of the ITC investigation, the financial performance of AT&T played the most significant, if not dominant, role, plaintiffs base their objections on internal data and questionnaire responses submitted by AT&T. *See* Memorandum of Points and Authorities Submitted By Plaintiffs Iwatsu Electric Co., Ltd., et al., Toshiba Corporation, et al., and Matsushita Electric Industrial Co., Ltd., et al. ("Japanese Brief") at 94-96. The alleged inadequacies of the AT&T financial performance data, however, do not undermine the finding of material injury which is not seriously contested and which, in fact, plays a small role in the dispute at hand.

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[7] Plaintiffs also attack ITC's material injury determination on the grounds that ITC discussed the financial condition of the domestic industry as *a whole* including rental aspects, but concluded that the *rental* market was only indirectly relevant to its injury investigation. Plaintiffs' Reply Brief Submitted By Iwatsu Electric Co., Ltd., et al., Toshiba Corporation, et al. and Matsushita Electric Industrial, Ltd., et al. ("Japanese Reply Brief") at 9-11. (The most relevant effect of the rental market decline likely was the additional pressure it put on performance in the sales market. It is simply a background factor.) Plaintiffs allege ITC might have erroneously found injury based on the rental market. *Id.* at 10. As support for their position, plaintiffs cite *Maine Potato Council v. United States*, 9 CIT 293, 300-01, 613 F. Supp. 1237, 1244 (1985) where the court remanded an ITC determination because the court was unable to determine which of two opposite conclusions had been reached by ITC. Plaintiffs' contention may be dismissed easily because ITC specifically held that "the domestic industry * * * is experiencing material injury *regardless* of how one analyzes the significance of rental operations." Japanese Final Det. at 59 (emphasis added). ITC analyzed the financial condition of the domestic industry apart from the rental operations, finding that its performance was "very poor." *Id.* at 23. Its decision rested on the condition of the domestic industry exclusive of the rental operations, however, ITC could have determined, as it did, that the rental market was indirectly relevant and, as such, warranted some attention.

In addition, some of plaintiffs' objections are based more on the form of AT&T's financial data than on its substance. The allegation that AT&T misallocated revenues and selling, general and administrative ("SG&A") expenses between that portion of its business that produces the like product and its other lines of business, even if true, would not alter the fact that other factors firmly support a finding of material injury. The SG&A issue does, however, relate to plaintiffs' causation argument. *See infra* at 14-15.

Plaintiffs also assert that ITC did not adequately investigate AT&T's financial data. Most importantly, plaintiffs allege that unexplained significant changes in the multiple versions of AT&T's questionnaire responses indicate that AT&T improperly manipulated its financial data. Japanese Brief at 6, 94-96. AT&T's data, which provided the basis for its responses to the ITC questionnaire, were verified by ITC in an extensive on-site verification. Changes in AT&T's questionnaire responses from the preliminary investigation to the final investigation to the final verified version are all directly attributable to the fact that ITC requested certain changes to reconcile AT&T's questionnaire data with its audited financial statements.[8] ITC staff requested AT&T to use different methodologies in calculating their figures and, therefore, AT&T's different responses do not constitute impermissible "manipulation."

In sum, the court is not persuaded that the manner of AT&T's presentation of financial data led to any significant error by ITC. In this case, ITC found that several factors clearly evidenced the poor condition of the domestic industry. Given the exhaustive and comprehensive nature of the investigation and the convincing nature of the economic data revealed in the staff report, plaintiffs' attempts to persuade this court that ITC's view of the condition of the industry is unsupported, fail.

B. *Material Injury "By Reason Of" the LTFV Imports:*

Upon finding material injury to the domestic industry, ITC turned to the second prong of the inquiry, namely, the nexus requirement.

Plaintiffs claim that any injury suffered by AT&T was the result of its own lack of cost management, inherited from its monopolistic period, and that imports were not the cause of injury. Plaintiffs contend that the financial performance records compiled by ITC indicate that AT&T had enormous unnecessary expenses (reflected largely in SG&A expense data) and thus was not competitive with the more efficient foreign producers. Japanese Brief at 111-115. ITC found, however, that, in comparison with other producers, AT&T's SG&A expenses were "largely attributable to AT&T's captive distribution and marketing efforts, expenses normally incurred by interconnects, not foreign producers." Japanese Final Det. at 61. As noted earlier, *supra* at 4, AT&T is vertically integrated and sells its product directly to the end user using its

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[8] ITC staff expressly verified the SG&A expenses supplied by AT&T. Verification Report, L2 Doc. 98T at 6. Moreover, in the notes accompanying the verification report, the ITC staff explained that they themselves were requesting certain changes in the methodology used to allocate SG&A expenses. *Id.* at 9.

own internal distribution system. Importers and other smaller domestic producers sell their product at the wholesale level. As such, AT&T could be expected to incur many costs that other producers escape. Plaintiffs argue that distribution and marketing cannot account for all of the difference. This may be true, but it does not alter the outcome because ITC did not base its nexus determination on an assumption that AT&T was very efficient; it concluded that even if AT&T's SG&A expenses were unusually high due to inherited structural problems,[9] *the woes of the domestic industry were exacerbated by LTFV imports*. Japanese Final Det. at 61. The basis for this key conclusion is discussed *infra*.

Thus, AT&T cost and expense problems are not an area which concerns the court greatly, because ITC did not ignore AT&T's internal problems, it accepted them as one cause of injury.[10] The question remaining to be answered and the only one of real concern is on what evidence did ITC base its finding that LTFV imports were one cause of material injury – the nexus problem.

As provided by statute, in making its determination that the material injury is "by reason of" the LTFV imports, ITC is required to consider, *inter alia*, the volume of imports of the merchandise, the effect of such imports on prices of like products in the United States and the impact of such imports on domestic producers of like product. 19 U.S.C. § 1677(7)(B)(i) (1988). In its final determination ITC examined both the volume and the price effects of the subject LTFV imports and drew conclusions about their impact on the domestic industry. The court cannot envision a case in which causation could be proven by volume alone. If that is a theoretical possibility, it is not a theory which was invoked by ITC. ITC relied on both volume and price data and its conclusions as to each will be reviewed.

1. *Volume of Imports:*

The statutory directive issued to ITC instructs it to consider whether the volume of imports of the subject merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant. 19 U.S.C. § 1677(7)(C)(i) (1988).

ITC openly acknowledged that data comparison problems existed which made it difficult to compare the level of shipments of SBTSs and

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[9] There is some evidence noted in the staff report that SG&A did not decline with costs because of the efforts needed to make new sales in this market. Final Staff Rep. at A-80.

[10] In this regard plaintiffs place undue reliance on two internal AT&T documents in an attempt to prove that the financial problems within the domestic industry were directly traceable to inefficiency and poor sales performance within AT&T rather than the presence of LTFV imports. *See* Japanese Brief at 104-06, Joint Brief of Certain Plaintiffs Submitted By Goldstar Telecommunication Co., Ltd., et al., Executone Information Systems, Inc. and Inter-Tel, Inc. ("Korean Brief") at 81-93. Clearly these documents, intended for distribution among AT&T employees, sought to encourage the readers to improve their performance. The documents were never intended to be a complete explanation of all of the factors which coalesced to make the domestic SBTS industry what it is. Evidence that AT&T sought to improve its internal structure and performance in order to maintain its competitiveness does not undermine ITC's findings as to the impact of LTFV imports on the domestic industry.

subassemblies. Japanese Final Det. at 44.[11] Ultimately, however, ITC concluded that "[h]owever calculated, the market penetration of LTFV imports is significant." *Id.* Finding the *quantity* data on subassemblies to be the more probative in determining overall market shares of the domestic industry and imports, ITC chose not to emphasize market share by *value*. *Id.*[12] In quantity terms, imports of telephones generally increased. Final Staff Rep. at A-111, Table 29. Market penetration figures for two important segments of the SBTS industry, control and switching equipment and telephones,[13] were at high levels, generally exceeding fifty percent, *see id.* at A116, Table 31 and A-119, Table 33, although imports of control and switching equipment declined during the period. *Id.* at A 105, Table 26.

ITC's focus on the level of market penetration finds support in the language of the statute, which instructs ITC to analyze the volume of imports in either a relative *or* absolute sense depending on the requirements of that particular case. *See* 19 U.S.C. § 1677(7)(C)(i) (1988). This focus is consistent with ITC's discretion to consider levels of import penetration as one factor among the many that affect the domestic industry. *See Copperweld Corp. v. United States*, 682 F. Supp. at 571; *see also SCM Corp. v. United States*, 4 CIT 7, 13, 544 F. Supp. 194, 199 (1982). Furthermore, it is the significance of the volume or market share in terms of the particular industry that is critical. *See USX Corporation v. United States*, 11 CIT 82, 85, 655 F. Supp. 487, 490 (1987) ("Congress, this court, and ITC itself have repeatedly recognized that it is the *significance* of a quantity of imports, and not absolute volume alone, that must guide ITC's analysis under section 1677(7)."). Although, where volume is small, absolute volume alone may not guide ITC's analysis under § 1677(7), *see id.* at 84-85, 655 F. Supp. at 490, the significance of the quantity of imports here is apparent from the record. There is no real need to focus on *increases* in import volume or market penetration

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[11] Toshiba America Information Systems, Inc., argues that ITC included certain large telephone systems and "dual use telephones" in the import data, whereas these imports should not have been within the class or kind of merchandise investigated by Commerce. *See* Brief Submitted By Toshiba Corp. and Toshiba American Information Systems, Inc. ITC had sufficient reasons for concluding that since Toshiba had raised this scope issue only after Commerce rendered its final LTFV determination, ITC was not obligated to reconsider the scope of the investigation. Support for ITC's determination is found in *Kokusai Electric Co., Ltd. v. United States*, 10 CIT 166, 172, 632 F. Supp. 23, 28 (1986), where the court held that an importer, in an effort to upset a final determination, could not raise a scope issue after Commerce ended its investigation. The court rejects plaintiffs' arguments that *Kokusai* is inapplicable to the case at bar. *See* Reply Brief of Toshiba Corp. and Toshiba America Information Systems, Inc. at 1-3. If Toshiba wished to clarify the status of certain products, then it should have requested a scope ruling from Commerce during the period prior to the final LTFV determination pursuant to the following wisdom previously enunciated by this court:

> Plaintiff clearly could have raised the issue before Commerce during the investigation and Commerce could have examined the objection to the scope of the investigation at that time. Instead, plaintiff slept on its rights. It did not raise the question until the matter reached the Commission [ITC]. Laches would prevent plaintiff from raising the issue after the final determination by Commerce.

Kokusai, 10 CIT at 171, 632 F. Supp. at 27-28.

[12] ITC noted that market share comparisons are complicated because sales in the subassemblies market are made at different levels of trade. As noted earlier, most domestic products are sold at the end user level and, therefore, are reported at end user prices. Imports are sold at the interconnect and wholesale level, thereby necessitating that the data for imports are reported at wholesale prices. ITC did find that, in value terms, the market penetration of cumulated imports increased slightly before dropping in 1988. Final Staff Rep. at A-115, Table 30.

[13] ITC stated that figures for control and switching equipment provided the best indicator of import market penetration in the important new systems market segment. Japanese Final Det. at 45-46. Data on telephones was stated to represent the best indicator of the impact of imports in the overall SBTS market. *Id.*

where market penetration in quantity terms is approximately fifty percent and shows no sign of substantial decline. In this case substantial absolute volume and market penetration are vital and provide the backdrop for evaluation of all other factors.

2. *Price Effects of Imports:*

ITC's summary of its own findings reads: "Our determinations are based, *inter alia*, primarily on the poor financial condition of the domestic industry that is the result, at least in part, of the significant volume and market share of cumulated LTFV imports and their depressing and suppressing effect on domestic prices and profits." Japanese Final Det. at 3. As indicated in the previous sections, the court sees little to argue about in the areas of the domestic industry's condition and import volume and market share.

The heart of the dispute before the court is ITC's price effects finding. Price effects were analyzed by ITC basically in terms of price depression, and ITC's finding with regard to underselling was part of its price depression analysis. ITC concluded that there was evidence of price depression based on various factors, including the following: One, ITC noted various data indicating the decline of prices for small systems. Japanese Final Det. at 53. Two, ITC found that interconnects, especially in the smaller station market, were highly likely to "pass through" a significant amount of any cost savings to the customer. *Id.* at 48. Three, ITC found that significant price competition between the domestic like product and the subject imports existed. *Id.* at 52. Four, ITC observed that the data indicate that the prices of the imports were well below any price, which might include a premium,[14] that AT&T could command. *Id.* at 53. Five, the depressing effect of LTFV imports on domestic price was found to be corroborated by both lost sales data (including data on underselling)[15] and other data which indicated that the purchasing decision was price sensitive. *Id.*

a. *The Problems with the Price Constructs:*

Plaintiffs challenge ITC's finding on the basis that it is based entirely on defective price data. *See* Japanese Brief at 37-51, Korean Brief at 40-52. ITC recognized, however, that the price comparisons between the LTFV imports and the domestically produced subassemblies were prob-

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[14] ITC had concluded earlier that it would expect that "AT&T generally could command a premium for its product as the natural result of the familiarity of its name, its service reputation, and its advertising efforts." Japanese Final Det. at 50. Plaintiffs argue that this finding evidences that imported and domestically produced SBTSs were poor substitutes for each other and, therefore, the prices of imports did not significantly impact domestic prices. *See* Japanese Brief at 72-76. ITC refuted this contention by concluding that the existence of a price premium did not mean that there was an absence of competition between the two products. The premium price was found to be "the equilibrium price at which most purchasers would be relatively indifferent in choosing the premium product over the generic product." Japanese Final Det. at 50. The existence of such premium means that the competing product must undersell the premium product by a larger margin in order to successfully increase its market share.

[15] Lost sales data consisted of anecdotal information concerning why purchasers decided to buy an imported SBTS. ITC noted that the lost sales data "confirms instances of underselling well in excess of any possible price premium for AT&T." Japanese Final Det. at 53. As indicated, ITC used this data to bolster its price depression conclusion. *See id.* Both commissioners and the court have not always been satisfied that anecdotal lost sales data is highly probative, but neither has it been rejected outright, particularly if it is used corroboratively.

lematic. *See* Japanese Final Det. at 39, 47, 51-53. Because the great bulk of imports did not directly compete with domestic products at the same level of trade, ITC attempted to arrive at useful proxy, or constructive, prices. To this end, ITC issued questionnaires to the parties, requesting prices for actual retail sales of installed systems to end users, even though installation is not the subject of the product investigation. Interconnects were asked to calculate a price for a certain base subassembly model for the same periods based on their actual purchase prices.[16]

The nature of the product at issue created very great price comparison difficulties. First, even at the interconnect level the subassembly models were not uniform; features and capacities for expansion differed. Second, questionnaire respondents could not always answer in terms of the base model and sometimes gave answers with regard to models deemed as close as possible to the base model. Third, some answers, particularly those obtained from sellers to end users, included data outside of the definition of the product under investigation. Fourth, the domestic end user prices clearly included factors outside the scope of the investigation such as installation, service, maintenance charges or various options for which ITC made no adjustments.

There appears to be no dispute that the serious problems in comparing products occurred as a result of inherent product features and sales configurations. But there is also no real question that ITC must assess causation even in the face of such difficulties. Difficulties with, or even impossibility of, direct price comparison do not mandate a negative determination.

In this case, ITC concluded that the substantial volume of LTFV imports had "a depressing or suppressing effect on domestic prices." Japanese Final Det. at 61. Although ITC noted in regard to underselling that "the data of record indicate that the prices of subject imports were well below any price premium that AT&T could command," *id.* at 53, ITC only reaches this conclusion after observing that the price comparisons obtained from questionnaire responses were problematic.[17] ITC appears to have based its underselling finding essentially on end user surveys rather than the faulty questionnaire data. *Id.* at A-83.[18] Moreover, ITC's conclusions concerning underselling are used only as partial support for the finding of price *depression* in the domestic market.

b. *Price Depression:*

Given the problematic questionnaire data, the question arises as to the basis for a price depression finding. As indicated, the price depression analysis begins with an inquiry as to whether prices declined dur-

[16] It was necessary for the interconnects to calculate this price because they do not receive entire systems from the importers. Rather, they purchase subassemblies and configure systems for an individual customer or for resale. At the interconnect level of sale, there are no actual transactions which could be used to report prices of systems. ITC provided worksheets to the interconnects to ensure the requisite uniformity of the price calculations.

[17] ITC was so aware of its questionnaire data problem that it did not use it to make specific price comparisons or calculate margins of underselling. Final Staff Rep. at A-134.

[18] Contrary to the citation provided in the determination, ITC's footnote 145 apparently refers to page A-137 of the Final Staff Report, not page A-137 of the determination itself.

ing the period LTFV imports were present in the marketplace. Based on the information contained in the record, there is little doubt that ITC could have reasonably concluded that prices declined during the period of investigation. In addition to the testimony of one importer acknowledging that prices had been driven down,[19] ITC had at its disposal several published reports by independent industry analysts indicating that prices declined during the period.[20]

Moreover, it was permissible for ITC to rely on the problematic questionnaire response pricing data to *confirm* decline indicated by other data. The use of such pricing data as evidence of overall trends does not pose the same problems as does the use of the data to make point-to-point price comparisons. It appears that the data was used as a trend indicator. In examining the pricing data contained in Tables 34 and 36 of the Final Staff Report, ITC could have reasonably taken notice of the facially-apparent fact that the prices of SBTSs, especially those for the two smallest configurations, declined throughout the period. The data based on interconnect responses particularly, may be given some weight because it does not include non-subject merchandise, although problems of model variance do exist in that data as well. Nonetheless, as an indicator and confirmation of declining prices the data was not completely irrelevant. Had such data been unsupported by other significant data it probably should have been discarded, but, as indicated, price decline was supported by other evidence.

The court also notes that although it is ITC's burden to create an acceptable plan for investigation, plaintiffs are not in a strong position to argue that ITC's investigation was inadequate. Some of the plaintiffs concede that it was not possible for ITC to do a significantly better price analysis of the products at issue. ITC did not ignore plaintiffs' suggestions concerning feasible and useful ways of gathering the pricing data through the questionnaires issued to the producers.[21] Rather, ITC adopted most of plaintiffs' suggestions.

ITC recognized that to reach a positive causation conclusion based on price depression, not only must there be downward price trends in

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[19] *See* Hearing Transcript, L1 Doc. 480 at 302 (witness states that prices had been driven down in "our collective zeal to get market share").

[20] *See* AT&T's Prehearing Brief, L2 Doc. 50 at 54 (citing data published by Northern Business Information and the Eastern Management Group).

[21] Plaintiffs argue that ITC's questionnaire would have produced comparable data had ITC requested the costs rather than the prices of system constructs because price figures incorrectly included everything sold with the system. *See* Korean Brief at 48-51, Joint Reply Brief Submitted By Goldstar Telecommunication Co., Ltd., Executone Information Systems, Inc., and Inter-Tel, Inc. at 23-25. Actual prices, of course, are key to a dumping investigation. ITC did attempt to obtain comparable prices for installed systems at the end user level by asking detailed questions on installation costs. The court also notes that during the course of this exhaustive investigation, ITC met with and evaluated the various parties' requests regarding the pricing data section of the questionnaire and, when feasible, attempted to incorporate most of the suggestions. *See e.g.*, Final Staff Rep. at A-133 n. 151 (ITC notes that it modified the questionnaire to request companies to provide the installed price for the first six sales in each period. This modification was requested in a letter to ITC outlining one importer's comments concerning the pricing section of the producer questionnaire. *See* Letter to Elizabeth Henning from Akin, Gump, Strauss, Hauer & Feld dated July 27, 1989, L2 Doc. 100G at 3.) Examination of the initial suggestions and the final questionnaire indicates that, for the most part, plaintiff Executone's comments concerning how to obtain accurate installation costs were incorporated into section V-B of the questionnaire. *Compare* Letter to Rebecca Woodings from Hunton & Williams dated July 19, 1989, L2 Doc. 100F at 7 with Producer's Questionnaire, L1 Doc. 277 at 53 and 20. Plaintiffs complaints as to ITC's methodology are not very moving given that most of their suggestions were adopted by ITC.

prices to the interconnects, but the interconnects must be shown to "pass through" such product (equipment) cost savings to the end users, end use being the point of competition in the domestic market. Japanese Final Det. at 48. Given that almost fifty percent of the total installed price of a system may be attributed to the cost of the equipment, *see* Final Staff Rep. at A-62, Table 13, and after observing the competitive nature of the new systems sales market, ITC could reasonably have determined, as it did, that it was highly likely[22] that interconnects passed through savings in equipment costs to their retail customers. *See* Japanese Final Det. at 48. Furthermore, ITC noted that its conclusion was also supported by the Frank Lynn & Associates survey of interconnect pricing practices. *Id.* at 48-49 n. 134. The survey had reached the conclusion that the lowering of wholesale prices was the primary cause of the corresponding drop in retail prices. Statement by John Henderson, Vice-President, Frank Lynn & Associates, L2 Doc. 50, Vol. II at 6.[23]

Plaintiffs contend, however, that for a pass through to have been found properly, ITC would have had to analyze actual demand elasticities and determine that the demand for imported SBTSs was price-elastic.[24] Japanese Brief at 64-65. It is sufficient that ITC, after conducting a lengthy and exhaustive investigation into the SBTS market through both primary investigation and use of secondary materials, found that pass through of price savings occurred without expressly relying on elasticity analysis. Other evidence will suffice. In short, given that ITC is responsible for weighing the evidence and determining its probative value, *see e.g., Metallverken Nederland B.V. v. United States*, 13 CIT ____, ____, 728 F. Supp. 730, 746 (1989), ITC could have found the SBTS market to be competitive and concluded that a pass through did exist. Elasticity analysis, for purposes of ITC determinations, is still developing and is not required in every case. Furthermore, in this case there were varying views as to what the elasticities were and what roles they play. *See* Dissenting Views of Chairman Anne E. Brunsdale, Japanese Final Det. at 110 *et seq.*[25]

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[22] Plaintiffs place significance in the use of the phrase "highly likely," arguing that ITC did not make a conclusion as to the actual existence of a pass through. *See* Japanese Brief at 57-59. No "beyond a reasonable doubt" standard applies. One would presume that a simple "likely" would suffice. In any case, the text following "highly likely" leaves little doubt that ITC concluded pass through occurred. *See* Japanese Final Det. at 48-49.

[23] Plaintiffs criticize the survey because it did not address the reasons behind the declines in wholesale equipment costs. *See* Japansese Brief at 63-64. The survey, however, was offered as proof that price declines were passed along to the end user.

[24] According to Chairman Brunsdale "The aggregate elasticity of demand is defined as the percentage decline in the total purchases of a good, both domestic and imported, resulting from a 1 percent increase in the price of each producer's product. By examining the elasticity of demand we gain insight into the degree to which the increase in the demand for imports resulting from the low, 'dumped' price is the consequence of an increase in the total demand for the product rather than reduced sales by the domestic producers." *See* Dissenting Views of Chairman Anne E. Brunsdale, Japanese Final Det. at 114 n.28. *See also Alberta Port Producers' Marketing Board v. United States*, 12 CIT ____, ____, 683 F. Supp. 1398, 1400 (1988). A high elasticity of demand, *ceteris paribus*, would indicate that the increase in imports was due more to new sales than sales captured from the domestic producers.

Respondents argue that elasticity analysis is vital to a pass through determination. The court wonders what level and type of elasticity respondents would argue demonstrates no "pass through." The chairman does not answer this question and the other commissioners do not use elasticity analysis at all.

[25] The court also notes that Chairman Brunsdale, after examining the conflicting data, found causation a "close" case. Japanese Final Det. at 134. Elasticity analysis provides no simple, clean-cut solution here.

As the last step in connecting evidence on declining prices to a finding of price depression caused by LTFV imports, ITC found that the domestic product competes with the imported product at the end user level. ITC indicated its decision on this issue by stating "we believe that there has been significant price competition between the domestic like product and the subject imports." Japanese Final Det. at 52.[26] Record evidence substantially supports this finding. First, ITC had observed that, in a general sense, all producers offered most of the same features and there was no general product differentiation. *Id.* at 47, n. 131.[27] Decisions as to the comparability of products are very fact specific. There is much evidence in both directions on this issue so that the fact-finder has great latitude in making this particular finding. ITC also stated that "[W]e do not believe that quality differences are such that AT&T's product and the product of other producers, both foreign and domestic, are not acceptable substitutes for one another * * *" *Id.* at 50-51. For a discussion of how the finding of substitutability may be squared with AT&T's alleged premium price, see *supra* n.14 and corresponding text. Second, ITC noted that customer loyalty fueled price competition because there was an incentive to cut prices in the beginning in the hope that the initial losses would be recouped in the future. *Id.* at 41. That is, once a customer bought the basic system, any later purchases would need to be compatible with the system and more likely would be from the same producer. Third, ITC observed the strong competition in the dominant submarkets. *See id.* at 39, 52.

Thus, the record supports the conclusion that prices declined, that equipment savings were passed through to the consumer end user, that the foreign product was price competitive with the domestic product, and that price depression due to LTFV imports was present.[28]

CONCLUSION

The court has no doubt that the state of the domestic industry was attributable largely to its own multiple cost layering, but this does not mean that LTFV imports did not cause material injury. To borrow a principle from tort law, importers take the domestic industry as they find it. The industry was materially injured and ITC's determination that that injury was caused in significant part by LTFV imports was supported by the record evidence on volume, market penetration and price depression. One might also ask, will this record support the opposite conclusion? Although this is not the standard of review, it is often a good check to determine if further review by the court is necessary. In

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[26] In its investigation the ITC staff contacted various end users directly and questioned them about why they purchased their chosen SBTS. In each case, the end user reported that it had considered different SBTSs in reaching its final decision. *See* Final Staff Rep. at A-145-49. The end users' responses indicate that the various SBTSs were substitutable at the baseline level. Lost sales data corroborated the price competition finding, as well as the overall price depression finding. *See also supra* at 4.

[27] *See* Final Staff Rep. at A-137 (indicating that while options varied, standard features did not).

[28] Several other issues were raised, at least in passing, by the parties, such as the role of Centrex services in the industry and whether ITC properly investigated aftermarket sales. These matters and any others not specificlaly mentioned have been found not to warrant discussion.

this case the negative determinations raise greater questions than do the affirmative ones, both legally and factually. As the basic methodology of the affirmative determination is really not at issue and there is ample support for the factual determinations contained therein, they must be sustained. Furthermore, the defective questionnaire pricing data was used in the limited way that was appropriate and its use does not detract significantly from the substantial support for the affirmative finding. Accordingly, plaintiffs' motion for judgment on the agency record is denied and the action is dismissed.

ABSTRACTED CLASS

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	ASS
C91/47 2/12/91 Aquilino, J.	E. Gluck Corp.	86–5–00640	716.09– 715.0 Vario
C91/48 2/12/91 Aquilino, J.	E. Gluck Corp.	86–8–00995	716.09– 715.0 Vario
C91/49 2/12/91 Aquilino, J.	E. Gluck Corp.	86–12–01538	716.09– 715.0 Vario
C91/50 2/12/91	North American Foreign Trading Corp.	88–12–00905	715.05, 720.2 Vario
C91/51 2/14/91 Carman, J.	Olympus Corp.	88–7–00476	708.93 10% c

SSIFICATION DECISIONS

SESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
-716.45, 05, etc. ous rates	688.40, 688.45, 688.43, or 688.42 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
-716.45, 05, etc. ous rates	688.40, 688.45, 688.43, or 688.42 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
-716.45, 05, etc. ous rates	688.40, 688.45, 688.43, or 688.42 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
, 716.09, 28, etc. ous rates	688.42 4.3%, 4.1% or 3.9%	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989)	Chicago Quartz analog watches, etc.
or 9%	676.54 Free of duty 685.38 3.9%	EAC Engineering *v.* U.S., 9 CIT 534 (1985)	New York Olympus Optical Actuator

ABSTRACTED

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	
V91/3 2/12/91 Aquilino, J.	Crozier Imports, Inc.	83–3–00313	Fo
V91/4 2/12/91 Aquilino, J.	Crozier Imports, Inc.	83–6–00929	Fo

D VALUATION DECISIONS

BASIS OF VALUATION	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
Foreign value	Appraised unit values less 10.13% which represents the difference in weight between the kilo and the two pound packages	CPC Int'l Inc. *v.* U.S., S.O. 88–124 (1988)	Los Angeles Knorr soup mixes
Foreign value	Appraised unit values less 10.13% which represents the difference in weight between the kilo and the two pound packages	CPC Int'l Inc. *v.* U.S., S.O. 88–124 (1988)	Los Angeles Knorr soup mixes

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